No. 88-1119

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In the Supreme Court of the United States

OCTOBER TERM, 1988

MESSIAH BAPTIST CHURCH, a Colorado non-profit corporation; THOM MOORE; ARDEL MOORE; DONNA L. NIVE; and JESS PAULSEN,
Petitioners,

vs.

THE COUNTY OF JEFFERSON, STATE OF COLORADO; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, STATE OF COLORADO; HAL ANDERSON, BOB CLEMENT, and JAMES MARTIN, not individually but as members of the Board of County Commissioners of the County of Jefferson, State of Colorado,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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January 4, 1989

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QUESTIONS PRESENTED

1. Do the Jefferson County A-2 Zoning Regulations in their 1974 form constitute an unconstitutional deprivation of rights protected by the first amendment to the United States Constitution?

2. Do the Jefferson County A-2 Zoning Regulations in their 1974 form constitute an unconstitutional deprivation of rights protected by the due process clause of the fourteenth amendment to the United States Constitution?

3. Do the special use provisions of the Jefferson County A-2 Zoning Regulations as amended in 1976 constitute an unconstitutional delegation of discretionary power to the decision making body?

LIST OF PARTIES

The parties to the proceedings below consist of Messiah Baptist Church ("Church"), a non-profit corporation organized for operating as a church, and individual plaintiffs representing a class consisting of all persons who were members of the Church on June 14, 1978.[1] The class was conditionally certified by the District Court on January 28, 1981. The Church has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

The respondents before this Court include the County of Jefferson, State of Colorado; The Board of County Commissioners of the County of Jefferson, State of Colorado; Hal Anderson, Bob Clement, and James Martin, not individually but as members of the Board of County Commissioners of the County of Jefferson, State of Colorado.

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No.

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OCTOBER TERM, 1988

MESSIAH BAPTIST CHURCH, a Colorado non-profit corporation; THOM MOORE; ARDEL MOORE; DONNA L. NIVE; and JESS PAULSEN,

Petitioners,

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THE COUNTY OF JEFFERSON, STATE OF COLORADO; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, STATE OF COLORADO; HAL ANDERSON, BOB CLEMENT, and JAMES MARTIN, not individually but as members of the Board of County Commissioners of the County of Jefferson, State of Colorado,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners Messiah Baptist Church, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on October 6, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 859 F.2d 820 (10th Cir. 1988), and is reprinted in the appendix hereto, p. A1, *infra.*

The memorandum opinion and order of the United States District Court for the District of Colorado (Matsch, Judge) has not been reported. It is reprinted in the appendix hereto, p. A34, *infra*.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983, the petitioners brought this suit in the District of Colorado. On June 2, 1982, the District of Colorado denied petitioners' motion for partial summary judgment and granted the respondents' motion for summary judgment of dismissal, holding that all claims arising before June 14, 1978, were time barred and that the denial of the special use application on that date was based upon valid, neutral criteria, fairly applied to the church property. Petitioners appealed the statute of limitations question and on April 28, 1986, the Tenth Circuit Court of Appeals reversed the dismissal of the claims and remanded the case for further proceedings.

On April 21, 1987, the District of Colorado denied petitioners' amended motion for partial summary judgment and granted the respondents' motion for summary judgment. See p. A34, *infra*. On petitioners' appeal, the Tenth Circuit on October 6, 1988, entered a judgment and an opinion affirming the District of Colorado and ordering petitioners' action be dismissed (Judge McKay dissenting). See p. A1, *infra*. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ZONING REGULATIONS INVOLVED

U.S. CONST. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

U.S. CONST. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Jefferson County Zoning Resolution, Section 1.

In pursuance of the authority conferred by Chapter 92, Session Laws of Colorado, 1939, this Resolution is enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of Jefferson County by lessening the congestion in streets or roads, securing safety from fire and other dangers, providing light and air, avoiding undue congestion of population, facilitating the adequate provision of transportation, water, sewage, schools and other public requirements, securing protection of the tax base, and by other means in accordance with a Comprehensive Plan. (Orig. 5-6-46).

Jefferson County Zoning Resolution in effect as of October 2, 1974. See p. A49, *infra*.

July 21, 1976 Resolution Amending Jefferson County A-2 Zoning. See p. A53, *infra*.

STATEMENT OF THE CASE

This damage action was instituted by Messiah Baptist Church and individual members of the Church pursuant to 42 U.S.C. §1983. The complaint alleged that the 1974 and 1976 versions of the Jefferson County Agricultural Two (A-2) Zoning Regulation were constitutionally invalid both on their face and as applied to the Church in 1978, and therefore deprived petitioners of their civil and constitutional rights secured by the first and fourteenth amendments. The 1974 regulations prohibited church uses in the A-2 zone. See pp. A47-A52, *infra*. The regulations as amended in 1976 allowed church uses as a special use by permit, although the regulations did not set forth the criteria under which a permit would be granted. See p. A53, *infra*.

In July 1974, the Church acquired an 80-acre parcel of land located in Jefferson County. See p. A57, *infra*. The Church intended to use this land to erect a church building and other church facilities. In 1974, the A-2 zoning district where the land was located allowed uses for single-family dwellings, barns, stables, poultry hatcheries, fish hatcheries, dairy farms, forestry farms, fur farms, greenhouses, roadside stands, feedlots, dog kennels, catteries, veterinary hospitals, and certain other related uses. Land in the A-2 zoning district could not be used for churches, even as a special use, under the 1974 zoning regulations. See pp. A47-A52, *infra*.

As of October 2, 1974, the Zoning Resolution of Jefferson County had established 25 zoning districts. Sixteen of these districts, including the A-1, A-2 and R-T zones, authorized a residential use in some form. Even though churches were permitted as a right in every zone where residences were permitted, churches were not permitted in the A-1, A-2 and R-T districts.

In late September or early October 1974, the Church applied to the appropriate county official for a permit to erect a single structure to be used for worship, administrative offices and school purposes on its land. The application was denied because the A-2 zone district did not permit the use of the land for a church or a church school. See p. A58, *infra*.

The preamble to the Zoning Resolutions states the general purposes of the Resolutions, but articulates no reason why Jefferson County's legislative body deemed it appropriate to exclude church uses from the A-2 zone district, while authorizing them as a use by right in other residential districts. See p. A46, *infra*. None of the evidentiary materials submitted to the courts below explains the problems Jefferson County was seeking to solve by excluding churches from the A-2 district or the specific public policy the exclusion was intended to serve. Additionally, a church was not allowed as a special use in any zoning district in 1974.

In July 1976, the respondents adopted a resolution which added "churches, rectories, parish houses, and church schools" as special uses authorized in the A-2 zone district. See p. A53, *infra*. As amended, the Zoning Resolution provided that these special uses were permitted only upon approval of the Planning Commission and the Board of County Commissioners. Consistent with

its previous legislative enactments on the subject, this amendment again failed to advise the Planning Commission or the Board of County Commissioners of the factors they were to consider in taking action upon any request for a church use.

In April 1978, the Church filed a special use application for permission to develop 10 acres of its 80 acre parcel. No standards or guidelines were set out in the Zoning Resolution to guide the Church in preparing its application. The Church sought zoning approval for the erection of a single, 12,000 square foot structure, designed to be used for worship services, administrative offices, classrooms and recreational (gymnasium) purposes. In conjunction therewith, it proposed a parking area for 151 vehicles, and an additional area, referred to as an "amphitheater," where worshippers could park and, without leaving their cars, listen to religious services over individual speakers similar to those in drive-in theaters. See p. A59, *infra*.

A public hearing was held before the Planning Commission in May 1978, and on June 14, 1978, the Planning Commission voted to deny the application. Without any attempt to suggest ways of eliminating or reducing its concerns, the Commission gave nine reasons for the denial, which included access problems, erosion hazards, and the fact that fire protection for the site was inadequate. See p. A60, *infra*. No constitutionally adequate standards guided the Commission in its exercise of discretion to grant or deny a use permit for a place of worship in the A-2 zone district.

In August 1978, the Church gave notice to the County, pursuant to Colorado statutory provisions, of a possible claim by the Church against the County. A state action then was instituted by the Church in July 1979. In

February 1980, the state district court dismissed the complaint because the action had not been commenced within 30 days after the Commission's final action, as required by statute. No appeal was taken from that order of dismissal. See p. A62, *infra*.

In 1979 the holder of the purchase price promissory note threatened to foreclose upon the deed of trust on the 80 acre parcel, which secured the payment of the note. The Church then executed and delivered to the note holder a quit claim deed in lieu of foreclosure. See p. A61, *infra*.

On June 13, 1980, petitioners brought this suit in the District of Colorado, invoking federal jurisdiction under 42 U.S.C. §1983. The petitioners filed a motion for partial summary judgment declaring infringement of rights protected by the first and fourteenth amendments to the United States Constitution, reserving the issue of damages. The respondents moved for summary judgment of dismissal. The Colorado District Court granted the respondents' motion, holding that all claims arising before June 14, 1978, were time barred and that the denial of the special use application on that date was based upon valid, neutral criteria, fairly applied to the church property. Accordingly, the denial was considered as a reasonable restriction of the petitioners' first amendment rights. The petitioners appealed the statute of limitations question and the Tenth Circuit Court of Appeals reversed the dismissal of the claims and remanded for further proceedings. The parties renewed their respective motions for summary judgment based on stipulated facts and documents. Respondents' motion for summary judgment was granted by the Colorado District Court, and that judgment was affirmed by the Tenth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

The decision below that zoning regulations precluding a church from building on its property does not violate the first and fourteenth amendments raises important and unresolved problems.

The Tenth Circuit has here held that under a free exercise analysis, the building of a church implicates only minor or insignificant free exercise interests. It concludes that the Jefferson County zoning district plan merely imposes an indirect financial burden on the exercise of religion which does not rise to infringement of religious freedom. In considering whether the County had alternate means to accomplish its purpose, the Tenth Circuit held that where the burden imposed by the government is rooted only in secular philosophy or personal preference, the scale reads in favor of upholding the government action. The Tenth Circuit's disregard of the integration between places of worship and religion deserves this Court's attention.

The question of the importance of the church to religious practice is directly at stake in this case. Petitioners assert that the assembly of a community of believers is an integral part of religion which communicates to outsiders the church's identity as a group committed to a common ideal. Religious ritual through the church as a group is an important part of an individual's spirituality.

It is clear that a law enacted with the purpose of directly regulating religious beliefs, impeding the observance of any religion or discriminating among religions

is unconstitutional. *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961). It also is clear that conduct flowing from religious belief merits free exercise protection. See *Grosz v. City of Miami Beach, Florida*, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984).

Laws that impose direct burdens on religiously motivated activity must survive the most exacting scrutiny. If compliance with a law forces a choice between behavior consonant with "fundamental tenets of . . . religious beliefs" and behavior subject to affirmative sanctions or leading to the withholding of government benefits, the government must demonstrate that the law is the least restrictive means of achieving a compelling state interest that overbalances the religious interest affected. *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Thomas v. Review Bd. of Indiana Employment Sec.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1980); *Rosen v. Portland*, 641 F.2d 1243 (9th Cir. 1981).

On the other end of the scale, this Court has held the rational basis standard is applicable to zoning laws which affect a secular interest. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). In the present case, the Tenth Circuit does not term the building of a church as a secular interest, yet it holds the activity as implicating only minor or insignificant free exercise interests. Petitioners assert the 1974 A-2 zoning regulations impose a constitutionally significant burden to the free exercise rights of the Church.

A place of worship is as central to the first amendment concept of free exercise as a public forum is central

to the concept of free speech. When a government agency seeks to encumber through zoning ordinances the use of buildings for religious worship, it impinges on speech, assembly and religious exercise. The impingement is the same as when government prohibits the use of buildings for live entertainment, see *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (zoning ordinance prohibiting use of building for live entertainment anywhere in town found unconstitutional); the use of public forums, such as roads or sidewalks, for parades or protests, see *United States v. Grace*, 461 U.S. 171 (1983); *Shuttlesworth v. Burmingham*, 394 U.S. 147 (1969); *Hague v. CIO*, 307 U.S. 496 (1939); and the use of property for other speech-related activities whether within or without buildings . *See City of Lakewood v. Plain Dealer Publishing Co.*, 108 S.Ct. 2138 (1988). The Tenth Circuit's decision here does not acknowledge that the County's outright prohibition or legally discretionary power to deny the right to use buildings for worship, religious communication and religious assembly on the Church's own property is equally as odious as the outright prohibition or discretionary power to deny parade or protest permits on public property. Additionally, as the Eleventh Circuit recognized, "the restriction of religious conduct on public streets and in airports is less burdensome than restriction of such conduct on an individual's property." *Grosz v. City of Miami Beach*, 721 F.2d 729, 740 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984).

This Court should grant this Petition to provide guidance to zoning authorities and courts below as to the standard applicable in the difficult balance between first amendment protection of worship and the state's interest underlying the validity of zoning ordinances. This case

provides an opportunity for the Supreme Court to expand its body of precedent in the evolving standards for reviewing government regulations which infringe on first amendment interests.

Petitioner contends the Tenth Circuit should have used the narrowly-drawn time, place and manner restrictions to determine the constitutionality of the regulations. This Court has applied a time, place, and manner test to speech and assembly cases which also should be applied to cases involving the effect of zoning on religious "exercise." This test has been applied to the review of the regulation of religious speech. See *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981). Reliance on the speech and assembly cases provides a useful standard and procedural framework for determining the proper balance between the interests of the state and of persons seeking to engage in religious speech, assembly, and worship activities.

Application of time, place and manner restrictions to cases involving zoning laws results in at least four significant benefits:

> First, the approach provides a higher level of judicial protection, appropriate to the religious interests involved, than does the due process analysis. The burden of proof is shifted definitively to the government once the initial infringement is recognized. Moreover, there are several steps at which the government may fail to carry its burden: it may fail to demonstrate that the ordinance is a neutral one; it may fail to demonstrate that its interests are sufficiently substantial; or it may fail to demon-

strate that its chosen means are least burdensome on protected activity.

Second, the least restrictive alternative inquiry, like the due process analysis, provides a flexibility that enables a government to justify its regulation by demonstrating, upon the particular facts of the case, that the ordinance is the least restrictive possible. For example, a municipality may well be able to demonstrate that the construction of a particular church would be unsuitable to a residential area because it would be "basically incompatible with the normal" residential use.

The analysis has the third advantage of enabling a court explicitly to recognize the religious interests involved without inquiring into the nature of the religious interests. A court need not decide that an asserted interest is "fundamental," "cardinal," or even not "bizarre" in order to apply the analysis. All it must do is accept the plaintiff's sincere assertion that the activity restricted by a state regulation is religiously motivated. This removes judicial temptation to shop for the appropriate analysis by categorizing the nature of the religious interest involved.

Fourth, and perhaps most important, the approach eschews the ad hoc balancing process engaged in by the state courts. While such an approach may sometimes arrive at appropriate results, it does so only inconsistently, and at the price of obscuring the relative weights the court has assigned to competing religious and secular interests.

Comment, *Zoning Ordinances Affecting Churches: A Proposal for Expanded Free Exercise Protection*, 132 U.Pa.L. Rev. 1131, 1160-61 (footnotes omitted).

Petitioners urge this Court to employ a four-step analysis in this determination: 1) determine whether the challenged regulation infringes on a first amendment interest; 2) determine whether the ordinance is content neutral; 3) weigh the governmental interest at stake; and 4) analyze whether the regulations are narrowly tailored to achieve the state's legitimate ends.

In the present case, the 1974 ordinance cannot facially satisfy the time, place and manner standard because its absolute prohibition of churches in the A-2 zone was not narrowly tailored to meet the state's legitimate ends. The Tenth Circuit's decision to uphold the 1974 zoning ordinances raises important questions about balancing interests between the government's right to institute zoning restrictions and the individual's first amendment right to free exercise of religion.

It is especially important for this Court to establish the relationship between the first amendment free exercise right and the building of a house of worship where due process considerations are involved. The Tenth Circuit reviewed the due process challenge to the 1974 A-2 zoning regulations under the reasonable relationship standard. The Church contends that the Court must review the due process challenge to the 1974 A-2 zoning regulations under the strict scrutiny standard, as applied in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). The burden should be upon the party seeking to uphold the regulation to demonstrate that it serves a compelling state interest and is narrowly drawn to address only the state interests at stake.

At issue in the present case is the question of whether it is constitutionally permissible to exclude religious uses

from a particular zoning district. The Tenth Circuit has held that the exclusion of churches from residential zoning districts is constitutionally permissible, following *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, 90 Cal.App.2d 656, 203 P.2d 823, *appeal dismissed*, 338 U.S. 805 (1949). However, petitioners contend there is no logical reason why a church should be excluded from a district where the minimum lot size is ten acres when churches are allowed in other residential areas with far smaller minimum lot sizes. Petitioners urge this Court to overturn the Tenth Circuit and endorse other state court decisions, such as *City of Englewood v. Apostolic Christian Church*, 146 Colo. 374, 362 P.2d 172 (1961). A well-known expert on zoning has concluded, relying on *Englewood* and other state court decisions, that:

> The wide majority of courts hold that religious uses may not be excluded from residential districts. As religious uses contribute to the general welfare of the community, and can contribute most when located in residential districts, an ordinance which excludes such uses from residential zones does not further the public health, safety, morals or general welfare.

2 Anderson *American Law of Zoning*, §12.19 at p. 447 (2d ed. 1976).

While not always based upon the "close scrutiny - compelling state interest" tests formulated for first amendment cases, nevertheless, this majority jurisprudence stands for the proposition that problems that might normally be fostered by a church use in a residential neighborhood, such as traffic congestion or depreciated land

values, are not of such compelling importance to allow a church to be *banned* from such neighborhoods. *Board of Zoning Appeals v. Schulte,* 172 N.E.2d 39 (Ind. 1961). *See Congregation Dovid Ben Nuchim v. City of Oak Park,* 40 Mich.App. 698, 199 N.W.2d 557 (1972); *St. John's Evangelical Lutheran Church v. City of Hoboken,* 195 N.J. Super. 414, 479 A.2d 935 (1983); *Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor,* 379 N.Y.S.2d 747, 342 N.E.2d 534 (1975), *cert. denied,* 426 U.S. 950 (1976); *City of Sumner v. First Baptist Church,* 97 Wash.2d 1, 639 P.2d 1358 (1982). *See also* 3A N. Williams, *American Land Planning Law,* Ch. 77 (1985 revision). Thus, where zoning regulations affect religious uses, many courts have reversed the presumption of validity that normally favors legislative enactments, placing the burden on government to establish a substantial relation between exclusion of such uses and important police power goals.

The terms of the later 1976 A-2 zoning regulations which allow churches pursuant to a special use permit do not provide any standards or procedural safeguards which are, when considered with statutory provisions, sufficiently detailed to provide all users and potential users of land with notice of particular standards and requirements imposed by the County. *See Beaver Meadows v. Board of County Commissioners,* 709 P.2d 928 (Colo. 1985). On the face of the 1976 amendment, the Board and the Commission are each given unbridled discretion to withhold approval of a church use for any reason deemed appropriate by the members of either agency, even though that reason might not be related to any valid purpose that the County might have been seeking to serve by banning churches in the A-2 district and even though such a reason (which might go un-

articulated) would not otherwise have any substantial relationship to the public's health, safety or welfare. Petitioners contend the government's obligation to provide standards and criteria for activity subjected to a license or permit requirement is enhanced where a first amendment interest is at stake.

> Regulations . . . which restrict the exercise of first amendment rights by requiring prior approval are going to be suspect, and will face an unfavorable presumption in regard to constitutional validity. . . . Any standard set forth must be "susceptible of objective measurement," . . . and "precision of regulation must be the touchstone." Sufficient procedural safeguards must be present. . . [citations omitted]

Espinoza v. Rusk, 634 F.2d 477, 482 (10th Cir. 1980).

Nothing in the 1974 Resolution, see pp. A47-A52, *infra*, or the 1976 amendment, see p. A53, *infra*, advised either the Commission or the Board of the factual circumstances or guiding criteria which would warrant approval or disapproval of an application. The Church was completely in the dark as to how to apply for a special permit, what format to follow, and what factors should be addressed. Likewise the County had no guidelines for its decision-making. Thus, the invalidity of the original legislation's absolute prohibition against a church use was compounded by the 1976 enactment's requirement that the Church be submitted to a local administrative procedure which vested unwarranted discretion in administrative officials. The 1976 amendment is not saved from procedural due process problems because the Planning Commission did, in fact, apply valid criteria in rendering its decision. The amendment improperly required the Church to submit

itself to the whim of an administrative board and petitioners urge this Court to hold that the test of invalidity on procedural due process grounds is not what in fact did occur, but, rather, what the legislation on its face could have allowed.

II.

Sixth, Tenth and Eleventh Circuit decisions conflict with a holding of the Fifth Circuit.

This Court should grant this Petition to settle the confused state of free exercise analysis which exists among the circuits today. In *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983), a case of first impression in the federal courts at the time, the Sixth Circuit upheld the constitutionality of a zoning ordinance excluding church buildings from residential districts. The Sixth Circuit concluded that the zoning ordinance did not clash with the church's free exercise rights. It viewed the building of a church as a secular activity, infringing only on the economics of church interest. The court therefore tested the zoning ordinance under a due process analysis against a deferential minimal rationality standard, as set forth in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

In *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984), the Eleventh Circuit held that application of a zoning ordinance so as to prohibit plaintiffs from using their residence for organized religious services was not violative of the free exercise clause of the first amendment. The Court established two thresholds before balancing the government interest in zoning against the impingement on religious expression. The first threshold disting-

uished government regulation of opinions and beliefs from restrictions affecting religious conduct. The second threshold principle required that a law have both a secular purpose and effect to pass constitutional muster. Having passed these thresholds, the Eleventh Circuit balanced the cost to the government of altering its activity to allow the religious services to continue unimpeded versus the cost to the religious interest imposed by the government activity. It concluded that the burden which would be foisted on the government if religious services were allowed to be continued in a residential area excluding churches outweighed the burden on free exercise interest. The Eleventh Circuit noted "relevant Supreme Court cases provide only the most general hints for reaching a proper, final balance of free exercise and government interests. Little background exists as to what constitutes a 'substantial' government interest. And, courts called upon to make an *ad hoc* balance receive precedent guidance only in the discrete factual contexts involved in prior balancings." *Grosz v. City of Miami Beach, id.* at 738. The present case provides an opportunity for this Court to establish guidelines called for by the Eleventh Circuit.

In *Islamic Center of Mississippi, Inc. v. City of Starkville,* 840 F.2d 293 (5th Cir. 1988), the Fifth Circuit held a zoning ordinance which was content-neutral on its face, but as applied discriminated against the Muslim religion, was unconstitutional. The court determined from the facts that the ordinance burdened the Muslims' right of free exercise, and therefore the rational basis standard would not apply. The Government could not prove it had a compelling interest or purpose in excluding the Muslims from their own property, and the Fifth Circuit declared the zoning ordinance unconstitutional as applied.

In the present case, the Tenth Circuit opinion is split, two to one, with a strong dissent by Judge McKay. The court could not agree as to the level of the burden imposed on religious interests where a zoning ordinance excludes a church from a residential zone. The majority, following the *Grosz* rationale, determined that the 1974 A-2 zoning ordinance prohibiting construction of a house of worship on the Church's property shows no infringement on the religious tenets and practices of the Church. The majority then concluded the Church was subject to Jefferson County's reasonable zoning regulations. The dissenting opinion recognized the vital importance of places of worship to the free exercise of religion, and held it inappropriate to apply the lowest known standard —rational basis—to zoning ordinances used to prohibit the use of buildings as churches. The present case presents the U.S. Supreme Court with an opportunity to recognize, as dissenting Judge McKay recognized, that "(p)roperty is not an unlimited commodity. Congregations pay an onerous price in time, money and convenience when forced to select worship sites at a considerable distance from their homes. (Citation). Although other sites may be available, the first amendment demands that we know where, how many, how suitable, how convenient, and at what cost before we properly can judge the burden on exercise as compared to the burden on the state's legitimate interests." See p. A22, *infra*. The record in the present case shows the County has not satisfied its burden of showing that, facially, the 1974 A-2 zoning regulations were narrowly tailored to meet a sufficiently substantial government interest, or that the County had constitutionally adequate guidelines under the 1976 A-2 zoning regulations.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted. If the petitioners are correct in urging that the Tenth Circuit erred in upholding the Jefferson County zoning ordinances against a challenge by the Church, the matter should be remanded to the District Court for appropriate disposition.

Respectfully submitted,

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January 4, 1989

APPENDIX

OPINION FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

(Filed October 6, 1988)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 87-1634

MESSIAH BAPTIST CHURCH, a Colorado non-profit corporation; THOM MOORE; ARDEL MOORE; DONNA L. NIVE; and JESS PAULSEN,
Plaintiffs-Appellants,

v.

THE COUNTY OF JEFFERSON, STATE OF COLORADO, THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, STATE OF COLORADO; HAL ANDERSON, BOB CLEMENT, and JAMES MARTIN, not individually but as members of the Board of County Commissioners of the County of Jefferson, State of Colorado,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
No. 80-M-764

Ronald S. Loser (J. Scott Needham with him on the briefs) of LOSER, DAVIES, MAGOON & FITZGERALD, P.C., Denver, Colorado, for Plaintiffs-Appellants.

Gay B. Ummel (Patrick R. Mahan, County Attorney, with her on the briefs), Assistant County Attorney, Golden, Colorado, for Defendants-Appellees.

Before McKAY, TACHA, and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

The Messiah Baptist Church and various individuals representing a class ("Church") filed an action for damages under 42 U.S.C. § 1983 against Jefferson County, Colorado, and its Board of Commissioners ("County"). The Church contends the zoning regulations enacted by by the County are facially unconstitutional under the Due Process Clause of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment. The Church also contends the special-use provisions added to the zoning regulations by amendment in 1976 arose from an unconstitutional delegation of power.

Both parties moved for summary judgment below. The district court upheld the constitutionality of the zoning regulations, granted the County's motion and denied the Church's motion for summary judgment. From this order the Church appeals.

We AFFIRM.

FACTS

In July 1974, the Church purchased approximately eighty acres of vacant land in Jefferson County, Colorado. The land was located in an area of the County which was zoned Agricultural Two District (A-2). The A-2 zoning district allowed general ranching, intensive agricultural

use, and agriculturally related uses while protecting the surrounding land from harmful results. Land in the A-2 zoning district could be used for dwellings, barns, stables, poultry hatcheries, dairy farms, greenhouses, roadside stands, feedlots, feeding garbage to hogs, veterinarian hospitals, and the storage of manure and related uses. Land in the A-2 zoning district could not be used for schools, community buildings, and churches, even as special uses.

In 1974, the zoning regulations provided for twenty-five zoning districts. Sixteen of these districts authorized a residential use in some form. Of the sixteen zoning districts authorizing residential uses, thirteen specifically authorized a church use as a matter of right. The remaining nine zoning districts were devoted to agricultural, commercial, and industrial uses and did not allow residential uses of any type. With the exception of zoning districts A-1 and A-2, a church was an authorized use by right in every zoning district which authorized permanent residential use.

In September 1974, the Church applied for a building permit to erect a single structure which was to be used for worship, administrative offices, and school purposes. The application was denied, and the Church apparently attempted to appeal this decision to the County. The record, however, is silent as to whether or not any direct action was taken by the Church concerning its appeal.

Two years later, in July 1976, the County amended the A-2 zoning regulations to authorize church uses by special-use permit, subject to approval by the planning commission and the County. Shortly after this amendment, the Church filed an application for a special-use permit in-

dicating an intent to develop its entire eighty acres. The Church subsequently withdrew this application.

In April 1978, the Church again applied for a special-use permit, this time to build a 12,000 square foot structure to be used for worship services, administrative offices, classrooms, recreation (gymnasium) purposes, parking areas for 151 vehicles, and an "amphitheater" where worshipers could park and, without leaving their cars, listen to religious services through means of individual sound transmission devices similar to those used by "drive-in" movie theaters.

In May 1978, a public hearing was held before the planning commission concerning the Church's second application for a special-use permit. The planning commission denied the special-use permit, reduced to writing the nine reasons for the denial, which included access problems, erosion hazards, and the fact that fire protection for the site was wholly inadequate.

Due Process

The Church argues that the 1974 A-2 regulations are unconstitutional on their face because they deprive the Church of the right to use its property in violation of the Due Process Clause of the Fourteenth Amendment.

The principal test for measuring the constitutionality of a zoning ordinance under the Due Process Clause is set forth in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). In this case, the owner of a sixty-eight acre tract of vacant land sought to use his land for industrial purposes. The city zoned a portion of the sixty-eight acres for residential uses, and the owner

attacked the ordinances on due process grounds. The Supreme Court upheld the zoning ordinances and stated that before a zoning ordinance can be declared unconstitutional on due process grounds, the provisions must be clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *Id.* at 395. The Court further held that if the validity of the land classification is "fairly debatable," the legislative judgment must control. *Id.* at 388.

The Church seems to contend first that the A-2 zoning regulations are arbitrary because they permit dwellings but exclude churches from the agricultural district. The Church cites numerous state court decisions including *City of Englewood v. Apostolic Christian Church,* 146 Colo. 374, 362 P.2d 172 (1961), purportedly holding that exclusion of churches from residential areas constitutes arbitrary action. (It should be noted that *Englewood* was overruled in part, No. 87SA150 (Colo. Sept. 12, 1988), after the briefs were filed.) The state court cases cited by the Church are distinguishable on the facts from the case now before us. In *Englewood,* the regulations excluded churches as a use by right from all residential zone districts except the multifamily district. In the instant case, however, the regulations permit church use as a use by right in all but three residential districts. Consequently, the zoning scheme is clearly distinguishable.

Even if *Englewood* factually were on point, other state cases hold that the exclusion of churches from residential zoning districts is constitutionally permissible. *See Corporation of Presiding Bishop of Church of Jesus*

Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823, *appeal dismissed*, 338 U.S. 805 (1949). In our view, the better reasoned state court decisions hold that exclusion of churches from particular zoning districts, whether agricultural or residential, is not arbitrary *per se*.

The Church next argues that the A-2 regulations are arbitrary because they exclude churches but permit large agriculturally related commercial uses in the agricultural district. The Church contends that these commercial uses are at least as intensive as those uses proposed by the Church. In our view, however, the fact that the County's regulatory scheme is one of true differentiation does not render it arbitrary. The argicultural zones permit true and unfettered agricultural uses, and the decision as to what is or is not a compatible use therein is a decision which belongs to the legislative body. If the validity of the legislative classification is "fairly debatable," the legislative judgment must control. *Euclid*, 272 U.S. at 388. The Church has not established that the County's choice of compatible uses is unreasonable.

Finally, the Church asserts the court must review the due process challenge to the A-2 zoning regulations under the strict scrutiny standard rather than the reasonable relationship standard because the zoning regulation infringes the Church's First Amendment rights to exercise a religious preference. The Church further contends that the burden, therefore, is upon the parties seeking to uphold the regulation to demonstrate that it serves a compelling state interest and is narrowly drawn to address only the state interests at stake. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

In the instant case, however, the Church has not been denied the right to exercise a religious preference. Rather, the Church has been denied a building permit, and may not construct its house of worship where it pleases. That fact standing alone does not amount to a denial of the exercise of a religious preference. (See discussion of Free Exercise of Religion within.)

The record contains no evidence that the zoning regulations infringe upon *any* protected liberty. The A-2 zoning regulations affect only property interests and, therefore, need only bear a substantial relationship to the general welfare. *Euclid,* 272 U.S. at 391, 395. There can be little doubt that the zoning regulations bear a substantial relationship to the general welfare of the residents of Jefferson County. There is nothing arbitrary or unreasonable about precluding the building of a church near a feedlot or near hogs rooting through garbage. We hold that the 1974 A-2 zoning regulations are valid under the Due Process Clause.

Free Exercise of Religion

The Church contends that the 1974 A-2 zoning regulations are invalid on their face because they preclude the Church from building a house of worship on its property located within the A-2 zoning district. This court approaches the issue mindful of the often competing values of free exercise of religion and effective use by the state of its police powers. "[W]hen entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it. Abhorrence of religious persecution and intolerance is a basic part of our heritage." *Braunfeld v. Brown,* 366 U.S. 599, 606 (1961). On the other hand,

in *Schad,* 452 U.S. at 68, the Court stated: "The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." To complicate matters, we analyze the issue against a fluid precedent. As the Eleventh Circuit observed, "[i]nterpretation and application of the free exercise clause has created, within that field of constitutional doctrine, areas dotted by unanswered questions." *Grosz v. City of Miami Beach, Fla.,* 721 F.2d 729, 733 (11th Cir. 1983), *cert. denied,* 469 U.S. 827 (1984). We seek to approach the issue with sensitivity to the many evolving standards applicable to the case.

From 1974 to present, the A-2 zoning regulations did not permit church uses by right. In 1976, the County amended the A-2 regulations to allow the church uses upon approval of a special-use permit. In 1978, the Church applied for a special-use permit which was denied after a public hearing. Consequently, the Church was unable to construct its house of worship on its property located within the A-2 zoning district.

The first question to be addressed is whether the A-2 zoning regulations regulate religious beliefs. If they regulate religious beliefs, as opposed to religious conduct, then the regulations are unconstitutional. "[T]he [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute . . . ." *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940). Courts consistently distinguish religious beliefs from religious conduct. "The belief/conduct distinction has survived." *Grosz,* 721 F.2d at 733 n.5. As to what constitutes regulation of beliefs, the Supreme Court recently quoted

from *Sherbert v. Verner*, 374 U.S. 398, 412 (1963), and reiterated the concept that the free exercise clause prohibits the government from *coercing* the individual to violate his beliefs, and further stated: "The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S.Ct. 1319 (1988). One of the clear points of precedent is that the government may not use its power to interfere with or regulate the individual's religious beliefs.

The A-2 zoning regulations do not in any way regulate the religious beliefs of the Church. Nothing in the record shows any friction between the religious beliefs of the Church and the zoning regulations. Consequently, we proceed to the next inquiry.

Do the regulations impermissibly regulate religious conduct? Generally speaking, the government may regulate religious conduct. "It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). However, conduct flowing from religious beliefs merits protection when shown to be integrally related to underlying religious beliefs. In *Yoder*, the Court explained: "[W]e see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Id.* at 216.

By contrast, the record in our case discloses no evidence that the construction of a house of worship on the property in the A-2 zoning district is integrally related to underlying religious beliefs of the Church. The Church argues that constructing its house of worship is intimately bound to its religious tenets. As an abstract argument, this proposition is true. The evidence in the record, however, fails to establish any basis for this contention. The Church makes only a vague reference to a preference for a pastoral setting, but such is of no consequence to this analysis. What is important is that the record contains no evidence that building a church or building a church on the particular site is intimately related to the religious tenets of the church. At most, the record discloses the Church's preference is to construct its house of worship upon its land. We agree with the observation of the Sixth Circuit in *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303, 307, *cert. denied*, 464 U.S. 815 (1983), that "building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs." In short, under the facts of this case, the A-2 zoning regulations do not regulate any religious conduct of the church or its members.

We must also consider whether the zoning regulations place *any burden* on the free exercise of appellant's religion. "If the purpose or effect of the law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." *Braunfeld*, 366 U.S. at 607. In our case, the record reveals that neither the purpose nor

the effect of the zoning regulations is to impede observance or discriminate between religions. Regulation of the location of church construction is not an impediment to religious observance in the sense of a prohibition. Arguably, the zoning regulations affect secular activity and make the practice of religion more expensive, and therefore impose an indirect burden on the exercise of religion. Even assuming that the effect of the regulations is to add expense to the practice of religion, this indirect burden does not invalidate the zoning regulations if the state cannot accomplish its purpose by means which do not impose such a burden. *Id.* at 607. In holding that the zoning ordinance which did not permit church buildings within a particular zoning district did not infringe the Congregation's freedom of religion, the *Lakewood* court simply characterized construction as a secular activity which made the practice of religious beliefs more expensive. The court then observed that the ordinance did not pressure the Congregation to abandon its religious beliefs through financial or criminal penalties, and does not "tax" the exercise of religion. *Lakewood,* 699 F.2d at 307.

While we do not fully adopt the approach of the court in *Lakewood* (*Lakewood* assumes *Braunfeld* created a presumption of validity for governmental actions that impose only an indirect burden), we agree that the financial consequences to the church do not rise to infringement of religious freedom. As the court stated in *Lakewood, id.* at 307, "the First Amendment does not require the City to make all land or even the cheapest or most beautiful land available to churches." We agree.

Our inquiry, however, goes beyond *Lakewood.* Under *Braunfeld,* as explained in *Sherbert,* 374 U.S. at 398, and

Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981), we consider whether an alternative means exists whereby the County may accomplish its purpose by means which do not impose an indirect burden. Without question, the zoning district plan, one of true differentiation and upheld as sound under the due process analysis, cannot be implemented effectively without the resulting financial burden on the Church. When the burden imposed by the government rests on conduct rooted only in secular philosophy or personal preference, however, the scale always reads in favor of upholding the government action. *Grosz*, 721 F.2d at 737. Since the governmental action of adopting and implementing the zoning regulations does not affect religious practice, the indirect burden does not render the zoning regulations constitutionally infirm.

We hold that the 1974 Jefferson County A-2 zoning regulations do not violate the Church's First Amendment rights. We do not hold that the act of building is *per se* that of secular conduct. We limit our holding to the record before us; a record which shows no conflict between the zoning ordinances and the religious tenets or practices of this Church. This is not a case where the church must choose between criminal penalties or foregoing government benefits and its religious benefits such as is apparent in *Yoder*, 406 U.S. at 218, or *Sherbert*, 374 U.S. at 404. This case does not involve the compromise of the Church's fundamental tenets such as was involved in *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). In short, there is no infringement of the Church's religious freedom. A church has no constitutional right to be free from reasonable zoning regulations nor does a church have a constitutional right to build its house of

worship where it pleases. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Unconstitutional Delegation

The Church argues that the special-use provisions of the 1976 Jefferson County A-2 zoning regulations are constitutionally infirm. The Church claims that the regulations arise from legislation which conveys discretionary authority over conduct protected by the First Amendment and, therefore, the legislation must set forth narrow, objective, and definite standards to guide the decision-making body. The Church's entire argument on First Amendment activity is immaterial to this opinion because the zoning regulations do not affect First Amendment rights.

The Church next argues that the 1976 zoning regulations fail to meet the test for adequacy of delegation as established under Colorado law. We conclude to the contrary.

The State of Colorado has enacted a comprehensive County Planning and Building Code. *See* Colo. Rev. Stat. § 30-28-101 through § 30-28-204 (1973) concerning the standards to be followed in establishing zoning regulations and classifications. The Colorado legislature passed Colo. Rev. Stat. § 30-28-115 (Supp. 1976) which reads in part as follows:

> (1) Such regulations shall be designed and enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity, or welfare of the present and future inhabitants of the state, in-including lessening the congestion in the streets or roads or reducing the waste of excessive amounts of roads, securing safety from fire, floodwaters, and

other dangers, providing adequate light and air, classifying land uses and distributing land development and utilization, protecting the tax base, securing economy in governmental expenditures, fostering the state's agricultural and other industries, and protecting both urban and nonurban development.

The Colorado Legislature set forth further standards when it passed Colo. Rev. Stat. § 31-23-303 (Supp. 1975) which reads in part as follows:

(1) Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, floodwaters, and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to promote energy conservation; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

Jefferson County in turn adopted the following standards:

In pursuance of the authority conferred by Chapter 92, Session Laws of Colorado, 1939, this resolution is enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants

of Jefferson County, by lessening of congestion in the streets or roads, securing safety from fire and other dangers, providing light and air; avoiding undue congestion of population, facilitating the adequate provision of transportation, water, sewage, schools and other public requirements; securing protection of the tax base; and by other means in accordance with a comprehensive plan.

* * *

A. *Intent of Classification:*

The Agricultural Two Zone District is designed to allow areas for general farming, ranching, intensive agricultural uses and agriculturally related uses while protecting the surrounding land from any harmful effects.

In promulgating the standards for the A-2 zoning regulations, the County specified uses, height regulations, minimum lot sizes of 10-acres; setback standards, provisions requiring odors to be more than 500 feet from the boundary of a residential district; and provisions concerning exotic animals, dangerous animals, and even stallions.

The Church relies upon the Colorado case of *Beaver Meadows v. Bd. of County Comm'rs,* 709 P.2d 928 (Colo. 1985). In this case, a land developer submitted a proposal to create a planned unit development (PUD) to the board of county commissioners. The board approved the PUD proposal subject to several specified conditions. The court considered whether the state had authorized the county to impose the specified conditions. The court first determined that the county commissioners had this

authority, and then considered whether the county had exercised its statutory authority properly. The court explained that the delegation and subsequent implementation of zoning power must evidence sufficient standards and procedural safeguards to insure that any action taken by a county in response to a land-use proposal would be rational and consistent and that judicial review of the action would be available and effective.

We have reviewed the legislation and the challenged regulations herein and hold, under *Beaver Meadows*, that the 1976 resolution does not arise from an unconstitutional delegation of discretionary power. We further hold that the pertinent Colorado statutes and the zoning regulations contain sufficient standards to adequately guard against arbitrary and capricious operation. The state statutes and county regulations quoted above contemplate the Board may consider various factors in regulating land use and the county is specifically authorized to classify land use. While the state statutes are quite broad, the county regulations for the A-2 district provide adequate standards for their implementation.

The County raised a further matter by way of defense in its brief; that the County has not caused any deprivation of the Church's constitutional rights and any injury which may have been suffered by the Church was the result of self-inflicted hardship. Under *Magoc v. Hooker*, 796 F.2d 377 (10th Cir. 1986), we will not consider this argument for the reason that it was not presented to the court below.

The judgment of the district court is AFFIRMED.

No. 87-1634—MESSIAH BAPTIST CHURCH, et al. v. THE COUNTY OF JEFFERSON, etc., et al.

McKAY, Circuit Judge, dissenting:

This case involves a dispute over zoning restrictions placed by Jefferson County, Colorado, on places of worship.

In July 1974, the Messiah Baptist Church (Church) purchased approximately eighty acres of vacant land in Jefferson County, Colorado. The land was located in an area of the County which was zoned Agricultural Two District (A-2). The A-2 zoning district allowed general ranching, intensive agricultural use, and agriculturally-related uses. Land in the A-2 zoning district could be used for single-family dwellings, barns, stables, poultry hatcheries, fish hatcheries, dairy farms, forestry farms, fur farms, greenhouses, roadside stands, feedlots, dog kennels, catteries, veterinary hospitals, and certain other related uses. Land in the A-2 zoning district could not be used for schools, community buildings, and churches, even as special uses, under the 1974 zoning regulations.

In 1974, the Jefferson County zoning regulations provided for twenty-five zoning districts. Sixteen of these districts, including A-1, A-2, and R-T, authorized a residential use in some form. Even though churches were permitted as of right in every other zone where residences were permitted, churches were not permitted in the A-1, A-2, and R-T districts.

In September 1974, the Church applied for a building permit to erect a single structure which was to be used for worship, administrative offices, and school purposes.

The application was denied. Two years later, in July 1976, the County amended the A-2 zoning regulations to authorize church uses by special-use permit, subject to approval of the planning commission and the County.

In April 1978, the Church applied for a special-use permit to build a 12,000 square foot structure to be used for worship services, administrative offices, classrooms, recreation purposes, parking areas for 151 vehicles, and an "amphitheater" where worshipers could park and, without leaving their cars, listen to religious services through means of individual sound transmission devices similar to those used by "drive-in" movie theaters.

A public hearing was held before the planning commission concerning the Church's application for a special-use permit. The planning commisson denied the special-use permit. Without any attempt to suggest ways of eliminating or reducing its concerns, the commission gave nine reasons for the denial, which included access problems, erosion hazards, and the fact that fire protection for the site was inadequate. There are no constitutionally adequate standards in the ordinance which specifically guide the commission in its exercise of discretion to grant or deny a use permit for a place of worship in the subject zone.[1]

Places of worship have in almost all religions been as integral to their religion as have Sunday School, preaching, hymn singing, prayer, and other forms of worship which we have traditionally recognized as the "ex-

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1. "[W]hen a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981).

ercise" of religion.[2] Churches are the situs for the most sacred, traditional exercise of religion: baptisms, confirmations, marriages, funerals, sacramental services, ordinations, and rites of passage of all kinds.

In the free exercise context, churches serve much the same function as public forums do in the free speech context. Since time immemorial, citizens have gathered

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2. At least one scholarly piece has synthesized this notion by suggesting:

> Even for religious groups that place less emphasis on ritual, the assembly of a community of believers is an integral part of religion. The periodic reaffirmance of belief in an assembly of fellow believers reinforces the members' commitment to their individual faith. A religious group is more than the sum of its individual believers: the assembly of its members is essential to the creation of a unified community with a shared spiritual life and common goals. The assembly of the members of the church serves not only to create a sense of community among the members themselves through the shared expression of common beliefs, but also to communicate to outsiders the church's identity as a group committed to a common ideal.
>
> An individual's participation in group worship may serve not only to communicate her views within and without the group, but also as a form of self-expression, important to the inward self. Worship according to a given ritual has a psychological significance for believers, providing them with support and a sense of historical continuity with past participants in the same rituals. The spiritual and aesthetic experience that religious ritual offers contributes to the inner life of many individuals. The sense of community created by group worship is a factor in many persons' sense of self. Moreover, the very decision to be a member of a religious group, and to publicize that decision by attending religious services, may serve as a statement to the world of the way in which the believer chooses to be identified. As one commentator has observed, "freedom to have impact on others—to make the 'statement' implicit in a public identity—is central to any adequate conception of the self."

Comment, *Zoning Ordinances Affecting Churches: A Proposal for Expanded Free Exercise Protection*, 132 U. Pa. L. Rev. 1131, 1150-51 (1984) (footnotes omitted).

in public forums for speech and assembly purposes under the highest level of constitutional protection. The right to assemble or speak in a public forum cannot be absolutely prohibited, and may only be infringed by narrowly-drawn time, place, and manner restrictions. Similarly, the place of worship is central to the first amendment concept of free exercise as essentially the only place of religious "assembly" and the central place for the expression of religious "speech." Thus, when government agencies seek to encumber the use of buildings for religious worship, they are, in fact, impinging on speech, assembly, and religious exercise through the use of zoning ordinances. The impingement is the same as when government prohibits the use of buildings for live entertainment, *see Schad*, 452 U.S. 61 (zoning ordinance prohibiting use of building for live entertainment anywhere in town found unconstitutional); the use of public forums, such as roads or sidewalks, for parades or protests, *see United States v. Grace*, 461 U.S. 171 (1983), *Shuttlesworth v. Burmingham*, 394 U.S. 147 (1969), *Hague v. CIO*, 307 U.S. 496 (1939), and the use of property for other speech-related activities whether within or without buildings. *See City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988). The outright prohibition or the discretionary power (unaccompanied by adequate standards) to deny parade or protest permits on public property surely is not more odious to the first amendment than the outright prohibition or legally discretionary power to deny the right to use buildings for worship, religious communication, and religious assembly on one's own property.[3] As already suggested, to distinguish

3. Although the parade and protest cases involved speech on public, as opposed to private property, if anything, the

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building permit cases such as the case at hand from those involving the "use" of already-existing buildings is facile.[4] What is at stake is the power of the County, through zoning ordinances, to prohibit legitimate and protected first amendment uses at particular locations. Recently, in a similar case, the Fifth Circuit properly refused to apply that kind of distinction where a Muslim church sought to use an existing building as its place of worship. *Islamic Center of Mississippi, Inc. v. City of Starkville,* 840 F.2d 293 (5th Cir. 1988). Indeed, if first amendment free exercise rights are not triggered by the impingement on places of worship, the right of free exercise of religion is for practical purposes subject to broad infringement in all of its aspects except perhaps belief.

Footnote continued—

Government interest in controlling public property is greater than its interest in controlling private property. At stake in the instance of private property is the individual's interest in speech, assembly, free exercise, property, and the uses to which their own land may be put. The Government has correspondingly less interest (and the individual land owner has greater interest) in regulating private rather than public property. Even in the Eleventh Circuit case of Grosz v. City of Miami Beach, 721 F.2d 729, 740 (1983), *cert. denied,* 469 U.S. 827 (1984), where the constitutionality of a zoning ordinance prohibiting churches was upheld, the court acknowledged that: "Admittedly, restriction of religious conduct on public streets and in airports is less burdensome than restriction of such conduct on an individual's property."

4. Clearly, this dispute is not about building activity but rather is about the "uses" to which a building may be put. It is the County's zoning code, not the building code, that prohibits worship without a use permit. If the owners of the lot in question wanted to build a 12,000 square-foot manger in which they intended to shelter a flock of sheep, they could do so as a matter of right. If, on the other hand, the land were owned by a hypothetical church, called the Church of the Nativity, which intended to build the exact same structure, every nail and shingle the same, with the purpose to shelter a flock of worshipers, they could not do so without the unguided dispensation of the planning commission.

In these zoning cases involving places of worship, we have implicated at a minimum three different and cumulative interests recognized by the first amendment itself: speech, assembly, and religious exercise. In fact, insofar as I can discern, even the cases which have sustained zoning ordinances against free exercise claims have nearly always acknowledged some degree of encroachment upon free exercise interests.[5]

In noting the vital importance of places of worship to the free exercise of religion, the exercise of speech, and the exercise of the right to assemble, I do not here suggest that the state is powerless to regulate either the location or the use of places of worship. Nor is it necessary to this case or perhaps even wise to suggest that the correct standard to be applied is one of the highest standards known in the law, the compelling state interest. However, it would be inappropriate to continue to apply the lowest known standard—rational basis—to zoning ordinances, when they are used to prohibit the use of buildings as churches. *See generally West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 639 (1943) ("The right of a State to regulate . . . may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.").

Property is not an unlimited commodity. Congregations pay an onerous price in time, money, and convenience when forced to select worship sites at a considerable dis-

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5. *See Grosz,* 721 F.2d 729; Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. Lakewood, 699 F.2d 303 (6th Cir.), *cert. denied,* 464 U.S. 815 (1983).

tance from their homes. *See, Islamic Center,* 840 F.2d 293. Although other sites may be available, the first amendment demands that we know where, how many, how suitable, how convenient, and at what cost before we properly can judge the burden on exercise as compared to the burden on the state's legitimate interests.[6]

In cases involving the free exercise clause of the first amendment, courts typically have engaged in the characterization game by declaring which activities are "secular," "fundamental," or "integral." *See, e.g., Grosz,* 721 F.2d 729; *Lakewood,* 699 F.2d 303. Thus, it is not surprising that at least one other circuit, in a case with facts and issues very similar to the one before us, has characterized this type of dispute as one concerning the mere construction of a building and thus a secular activity. *See Lakewood,* 699 F.2d at 303. In *Lakewood,* as a result of the zoning ordinance, the congregation was prevented from building a church on its own property. The Sixth Circuit did not justify or explain its characterization, but rather declared that the restrictive zoning ordinance did not force the congregation to abandon its religious beliefs through financial coercion or criminal penalty and did not tax the exercise of religion. No consideration was given to the magnitude of the financial or convenience burden which an alternate site location might impose. It is not self-evident that an attempt to acquire and use an alternate site is always a trivial burden. Nor is it self-evident that a congregation's attendance pattern can

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6. "[W]hen the government intrudes on one of the liberties protected by the Due Process Clause of the Fourteenth Amendment, 'this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.'" *Schad,* 452 U.S. at 71.

be easily accommodated at an alternate site without substantial individual and collective burden.

Here, the majority opinion does not adopt quite such an extreme view but nonetheless targets the activity as implicating only minor or insignificant free exercise interests. Naturally, if we characterize the restricted activity as secular, there is no point to this litigation or to a discussion of the restrictions, since the minimum threshold of a rational basis, required in zoning cases not implicating the first amendment, can be satisfied so simply as to not admit of argument. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). A colorable claim of infringement upon first amendment liberty demands more. " 'One is not to have the exercise of [one's] liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " *Schad*, 452 U.S. at 77 (citing *Schneider v. State*, 308 U.S. 147 at 163 (1939)). The facts of this case easily present such a colorable claim.

To claim that this case is only concerned with the construction of a building is to miss the point. Surely no one would contend that it would be constitutional to zone an entire state or for that matter the whole country so as to prohibit churches. Even the justices who would broadly uphold zoning of some first amendment activities have not endorsed such a sweeping view. *See Schad*, 452 U.S. at 85-88 (Burger, C.J., dissenting). Congregants would be free to hold whatever religious beliefs they chose, but none would have a house of worship in which to come together. Such a situation would undoubtedly infringe upon "free exercise."

Initially the Supreme Court analyzed free exercise cases in terms of whether they involved "belief" or "con-

duct," upholding the protection of religious "belief" while sometimes declaring certain "conduct" to be unprotected. *Compare Wooley v. Maynard*, 430 U.S. 705 (1977); *United States v. Seeger*, 380 U.S. 163 (1965), *with Reynolds v. United States*, 98 U.S. 145 (1978); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). More recent Supreme Court decisions have broadened and added substance to the term "exercise." In my view, church-based "religious exercise" is as clearly protected under modern first amendment jurisprudence as is refusal to work on the Sabbath or refusal to send one's children to public schools. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963). It seems to me that even under the pre-*Sherbert/Yoder* standards, the building, maintenance, and use of places of worship qualify for first amendment protection not only because housed worship has been historically central to religion but also because such activities necessarily involve speech and assembly.

The rational basis standard applicable under *Euclid*, 272 U.S. 365, trivializes the burdening role which zoning can and does play in the exercise of religious expression. On the other hand, the complexity of meeting the legitimate public concerns expressed in *Euclid* suggests that applying the most rigid compelling state interest test would be improvident when there is available a set of well-developed standards cautiously worked out for balancing these unavoidable and constantly recurring conflicts between the two constitutionally acknowledged interests.[7]

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7. As one scholar has put it:

A better solution would be to acknowledge that zoning ordinances can affect religious freedom and to subject them

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Fortunately we are not left to such extreme tests as the only alternatives in adjusting the difficult balance between first amendment protection of worship and the state's interest underlying the validity of zoning ordinances. Through a solid body of precedent, the Supreme Court has developed a standard for reviewing government regulations which infringe on first amendment interests. In those cases the Supreme Court has applied a time, place, and manner test to speech and assembly cases. In my view, cases involving the effect of zoning on religious "exercise" are properly subject to the same analysis.[8] It is not apparent to me how place-of-worship cases can be analytically distinguished from other speech and assembly cases involving time, place, and manner restrictions. Indeed, the Supreme Court has already indicated that regulation of religious speech must be reviewed by applying time, place, and manner restrictions.

Footnote continued—

> to an analysis that explicitly confronts the first amendment interests at stake. Because zoning regulations do not prohibit belief or outlaw behavior that is central to any faith, the government should not have to prove a compelling interest to justify a zoning ordinance. Rather, the analysis appropriate for a neutral government act, like a zoning ordinance, that restricts religious expression should be the same as for neutral government acts that circumscribe secular expression. That analysis, well-established as applied to ordinances regulating the time, place, and the manner of a person's speech, requires that the government justify every such regulation by proving not only that it serves an important government purpose, but also that the purpose could not be accomplished by a means less restrictive of expressive freedom.

Comment, *supra*, at 1153.

8. Although traditional time, place and manner analysis has taken place in the context of cases involving public property, it is not the public/private distinction that is crucial for present purposes, but the nature of the protected activity. It is activity involving speech, assembly, and free exercise which falls under the rubric of first amendment protection.

See Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981). Rather than being cast adrift to engage in decision by ad hoc characterization, reliance on the speech and assembly cases provides a useful standard and procedural framework for determining the proper balance between the interests of the state and of persons seeking to engage in religious speech, assembly, and worship activities.

If it is conceded, as I believe it must be, that using buildings as places of worship is not a mere fringe or tangential part of religious exercise but rather central to the congregational worship experience, then it seems much easier to select and apply appropriate standards to the case which is before us.

In addition to avoiding the ad hoc characterization problem, application of time, place, and manner restrictions to cases involving zoning laws would result in at least four significant benefits:

> First, the approach provides a higher level of judicial protection, appropriate to the religious interests involved, than does the due process analysis. The burden of proof is shifted definitively to the government once the initial infringement is recognized. Moreover, there are several steps at which the government may fail to carry its burden: it may fail to demonstrate that the ordinance is a neutral one; it may fail to demonstrate that its interests are sufficiently substantial; or it may fail to demonstrate that its chosen means are least burdensome on protected activity.
>
> Second, the least restrictive alternative inquiry, like the due process analysis, provides a flexibility

that enables a government to justify its regulation by demonstrating, upon the particular facts of the case, that the ordinance is the least restrictive possible. For example, a muncipality may well be able to demonstrate that the construction of a particular church would be unsuitable to a residential area because it would be "basically incompatible with the normal" residential use.

The analysis has the third advantage of enabling a court explicitly to recognize the religious interests involved without inquiring into the nature of the religious interests. A court need not decide that an asserted interest is "fundamental," "cardinal," or even not "bizarre" in order to apply the analysis. All it must do is accept the plaintiff's sincere assertion that the activity restricted by a state regulation is religiously motivated. This removes judicial temptation to shop for the appropriate analysis by categorizing the nature of the religious interest involved.

Fourth, and perhaps most important, the approach eschews the ad hoc balancing process engaged in by the state courts. While such an approach may sometimes arrive at appropriate results, it does so only inconsistently, and at the price of obscuring the relative weights the court has assigned to competing religious and secular interests.

Comment, *supra* at 1160-61 (footnotes omitted).

From the time, place, and manner cases, a four-step analysis may be distilled. The first step is to determine whether the challenged regulation does indeed infringe upon a first amendment interest. Although characterizing the infringement as "indirect," the majority and

the defendants have acknowledged that the challenged ordinance at least infringes to some degree on a first amendment interest. As I have previously suggested, the infringement is substantial if not central to notions of "exercise" of religion. *See ante* at ..... The second step is to determine whether the ordinance is content-neutral. *Islamic Center* is an example of a case where a zoning ordinance was on its face content-neutral among churches, but as applied discriminated against the Muslim religion. In our case, neither ordinance on its face seem to discriminate among churches, although the 1978 ordinance invites discrimination through its overly discretionary use permit device. The third step is to determine the governmental interest at stake. At least since *Euclid* in 1926, courts have recognized that the government's interest in zoning is significant, important, or substantial. However, "the presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment." *Schad,* 452 U.S. 61, 77 (Blackmun, J., concurring). Finally, under this analysis the state must carry the burden in the first instance to prove that the means it has chosen are narrowly tailored to achieve the state's legitimate ends.

Because in my view the improper standard was applied, the County never had an opportunity to justify its initial denial of a building permit nor its subsequent denial of the use permit. I do not believe that the 1974 ordinance could facially satisfy the time, place, and manner standard, because its absolute prohibition of churches in the A-2 zone was not narrowly tailored to meet the state's legitimate ends. The limited and inadequate guide-

lines governing the exercise of discretion in the granting of special use permits also fails to pass constitutional scrutiny. Furthermore, it is doubtful that the reasons actually given by the County for denying the special use permit under the 1978 ordinance were narrowly tailored to minimize infringement on religious exercise. While the very device of a use permit is designed to allow the zoning authorities a means of adjusting particular applications to the site and circumstance, such a device is not intended to grant the authorities unbridled discretion. In the record before us, Jefferson County made no attempt to demonstrate that its denial of the special use permit was narrowly tailored to meet the County's legitimate ends. At least under the amended ordinance, the defendant could not argue that the zone is incompatible with churches under all circumstances. The amended ordinance declares churches acceptable subject only to a use permit. In such cases, as this one is, "it must be narrowly drawn and must further a sufficiently substantial government interest." *Schad*, 452 U.S. at 68.

Under the appropriate test, then, the zoning authorities would have the burden of demonstrating that the access and erosion problems cannot be otherwise solved. The County would have to demonstrate that the Church represented a greater erosion hazard than agriculture or, particularly, feed yards in the same zone. But even if the defendant makes this showing, their burden would also require a showing that the erosion hazards could not be ameliorated in the site plan sufficient to satisfy the minimum standards required for other activities permitted as a matter of right in the same zone. The same analysis is true of fire protection. A requirement in the use permit that an automatic sprinkling system be installed comes to mind.

Left to its own devices, the first time the trial court considered this case it correctly, in my opinion, "accepted the view that because the denial of a special use permit application precluded the plaintiffs from constructing a facility designed for use in religious worship and related activities, the defendant must demonstrate a government interest of sufficient magnitude to override the interest protected by the free exercise clause." *Messiah Baptist Church v. County of Jefferson,* No. 80-M-764, at 4 (D. Colo. 1987). Between that time and the review which resulted in the decision now before us, two decisions of sister circuits, *Lakewood,* 699 F.2d 303, and *Grosz,* 721 F.2d 729, intervened. In the absence of guidance from this circuit, the trial court understandably felt it likely that this circuit would follow the characterization of the interest at stake as being merely a secular "building activity". The trial court did not then have the benefit of the more detailed analysis of the interest at stake contained in the *Islamic Center* an even more recent decision from the Fifth Circuit. Once the trial court felt directed by those intervening circuit decisions to characterize the interest at stake as the mere secular activity of building a building, it reached the only result that such a characterization would permit. Had the court continued in its own original analysis of the interest at stake it undoubtedly would not have granted summary judgment in favor of the defendant zoning authority on the state of the record at that time. The court could not possibly have concluded that as a matter of law the County had satisfied its burden of showing that, facially, the zoning ordinances were narrowly tailored to meet a "sufficiently substantial" government interest or that the alternatives left open were "ample."

See Clark v. Community for Creative Non-violence, 468 U.S. 288, 293 (1984); *Schad*, 452 U.S. at 68.

The trial court was faced with an additional obstacle which this court also must face. The plaintiffs alleged that the statute was invalid on its face and made no attempt to allege that the statute was invalid as applied. If the correct standard is applied to this case, I conclude that the original ordinance that excluded all church uses from the zone, and the amended 1978 version that permitted churches, subject to essentially standardless permit requirements, were in fact invalid on their face. The 1974 ordinance which flatly prohibited the use of buildings in the A-2 zone as houses of worship unconstitutionally violated both the due process clause of the fourteenth amendment and the free exercise clause of the first amendment. A greater showing than is contained on the face of that ordinance is required to carry the state's burden when it is demonstrated that it imposes a significant burden on free exercise. The subsequent 1978 amendment allowing churches to be built only with a special use permit lacked adequate standards to guide the discretion of the zoning officials, thus it too fails to pass constitutional muster.[9] Indeed, by conceding that churches are in general compatible with the zone subject to the special supervision which use permits entail, the defendant is left without the usual justification that churches are simply incompatible with the overall character of the zone. In the parallel free speech cases, where government has used the permit device as a means

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9. "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth*, 394 U.S. 147 at 150-51.

of regulating time, place, and manner, the Supreme Court has made clear that the grant of the authority to administer the permit system must be accompanied by adequate objective standards reasonably calculated to insure against arbitrariness, capriciousness, or subterfuge. *Plain Dealer Publishing Co.*, 108 S. Ct. 2138. While there is room for debate about the amount of specificity and detail required of those standards, there is no statute or regulation in this case providing specificity sufficient to meet even the minimum standards.[10].

Therefore, I would hold that these regulations are invalid on their face. Because the case was presented to the trial court under an improper standard, it is premature to consider possible defenses or any of the other issues presented. I would remand the case to the trial court with the guidance herein given. The court may then shape and judge the case fairly, with each party having advance knowledge of the standard and burdens they must meet. If necessary, amendments to the pleadings should be permitted to insure due process.

In light of the views expressed herein, I must respectfully dissent from the opinion of the court.

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10. "[M]unicipalities may regulate expressive activity—even protected activity—pursuant to narrowly drawn content-neutral standards; however, they may not regulate protected activity when the only standard provided is the unbridled discretion of a municipal official." *Schad*, 452 U.S. at 84 (Powell, J., concurring).

MEMORANDUM AND ORDER FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(Filed April 21, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 80-M-764

MESSIAH BAPTIST CHURCH, a Colorado non-profit corporation; THOM MOORE; ARDEL MOORE; DONNA L. NIVE; and JESS PAULSEN,
Plaintiffs,

v.

THE COUNTY OF JEFFERSON, STATE OF COLORADO, THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, STATE OF COLORADO; HAL ANDERSON, BOB CLEMENT, and JAMES MARTIN, not individually but as members of the Board of County Commissioners of the County of Jefferson, State of Colorado,
Defendants.

MEMORANDUM OPINION AND ORDER

Matsch, Judge

On June 13, 1980, Messiah Baptist Church ("Church"), a non-profit corporation organized for operating as a church, and individual plaintiffs representing a class consisting of all persons who were members of the Church

on June 14, 1978, filed a complaint for damages resulting from the denial of a special land use application on that date. The claims are brought under 42 U.S.C. § 1983 within the jurisdiction provided by 28 U.S.C. § 1343. The defendants are the county and the county commissioners ("County") who established the challenged zoning regulations.

The plaintiffs filed a motion for partial summary judgment declaring infringement of rights protected by the First and Fourteenth Amendments to the United States Constitution, reserving the issue of damages. The defendants moved for summary judgment of dismissal. By a memorandum opinion and order entered on June 2, 1982, this court granted the defendants' motion, holding that all claims arising before June 14, 1978, were time barred and that the denial of the special use application on that date was based upon valid, neutral criteria, fairly applied to the Church property. Accordingly, the denial was considered as a reasonable restriction of the plaintiffs' First Amendment rights. The plaintiffs appealed only the statute of limitations question. The Tenth Circuit Court of Appeals reversed the dismissal of the claims and remanded for further proceedings. The parties have renewed their respective motions for summary judgment based on stipulated facts and documents. The questions presented are whether two county zoning regulations are valid exercises of the county's power to regulate land use. Oral argument was heard on April 10, 1987.

In July, 1974 the Church acquired 80 acres of land in Jefferson County for the purpose of building a church and other related facilities. That land was then and has continuously been zoned Agricultural Two ("A-2").

The resolution establishing the A-2 district stated that the "Agricultural Two Zone District is designed to allow for areas for general farming, ranching, intensive agricultural uses and agriculturally related uses while protecting the surrounding area from any harmful effects." The uses by right in an A-2 district were limited to one family dwellings, general farming, poultry hatcheries, greenhouses and nurseries, forestry farming, feed lots, fur farms, dog kennels and veterinarian hospitals. Certain other uses, such as sewage treatment plants, telephone and electric substations and water storage facilities were allowed as "special uses," upon approval by the Planning Commission and the Board of County Commissioners. In late September or early October, 1974, the Church applied for a building permit to build a single structure to be used for worship purposes, administrative offices and for school purposes. That application was denied because the A-2 zone district did not permit the use of land for a church or church school.

In July, 1976, the Board of County Commissioners amended the A-2 zone district regulations to allow the use of land within an A-2 district for "Churches, rectories, parish houses and church schools," upon approval of the Planning Commission and the Board of County Commissioners. The Church filed an application for such a special use, which was denied by the Planning Commission after a public hearing. The Church then filed suit in state court alleging that the County denied the Church its right to due process and freedom of religion. The court dismissed that action, holding that the exclusive remedy was judicial review under Colo. R. Civ. Pro. 106(a)(4), which was time barred.

A. The 1974 Zoning Resolution

The plaintiffs contend that the exclusion of churches from an A-2 zone district in the 1974 Zoning Resolution directly restricts the free exercise of religion, and that the County has failed to demonstrate any compelling need to restrict religious uses in such a manner or that such legislation is the least restrictive means of achieving any proper public goal. In support of their argument, the plaintiffs cite *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61 (1981), where the Supreme Court held that a ban on live entertainment violated the First Amendment because the Town failed to demonstrate a justification for the exclusion. There was no evidence to support the conclusion that live entertainment was incompatible with other commercial uses which were permitted, or that such a use presented parking or police problems different in either character or degree from problems presented by authorized uses. The Court concluded that lacking such evidence the Town could not justify such an interference with First Amendment rights.

The defendants point to three factors in support of their assertion that exclusion of churches as a use by right from the A-2 district does not violate the plaintiffs' constitutional right to freedom of religious worship. First, they argue that many other zone districts within Jefferson County provide places in which to locate a church as a use by right. Secondly, the plaintiffs have admitted that their church continues to operate and that they have been able to worship as they choose. Finally, the defendants note that the plaintiffs have not alleged that their property has any particular religious significance or that they were denied access to their property for the exercise of religious beliefs. Rather, the plaintiffs have

alleged that they were denied a building permit for a structure to be used as a church. In support of their position, the defendants cite *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983), and *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983).

These decisions came after this court's June 2, 1982 memorandum opinion and order. In the legal analysis made at that time, this court accepted the view that because the denial of the special use permit application precluded the plaintiffs from constructing a facility designed for use in religious worship and related activities, the defendants must demonstrate a governmental interest of sufficient magnitude to override the interest protected by the free exercise clause. I am now persuaded that my former analysis is incorrect. Following the guidance of the Sixth and Eleventh Circuits, I now conclude that the complete exclusion of churches and their related activities from the A-2 zone district did not infringe on any rights protected by the First Amendment.

The Resolution did not prevent the plaintiffs from practicing their faith, it merely prohibited the purely secular activity of constructing a building in one area of the county. When the plaintiffs purchased their property, the A-2 resolution at issue in this case was already in effect. The Church could have purchased property in another district within the county where church uses were permitted. The court in *Lakewood* held that when a zoning ordinance imposes only an indirect economic burden and a subjective aesthetic burden, that ordinance does not unduly burden religious freedom. The A-2 Resolution at most imposes indirect economic burdens on the

plaintiffs and, therefore, is not invalid on First Amendment grounds.

Citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the plaintiffs argue that the Resolution is invalid because there is no substantial relation between exclusion of churches and important police power goals. Specifically, they argue that the "A-2 Regulations allow a multitude of uses which are *at least* as intensive as those appurtenant to a church, causing identical impact problems." Plaintiffs Reply Brief, p. 4.

Churches are subject to reasonable zoning and other police power regulations. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). The classification of land uses is a legislative function, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974), and a particular regulation will be upheld if is rationally related to legitimate state concerns. *Id.* at 8; *Village of Euclid*, 272 U.S. at 388. The state legislature has specifically directed the counties to enact zoning regulations for the purpose of "promoting the health, safety, morals . . . of the present and future inhabitants of the state, . . . classifying land uses and distributing land development and utilization . . ." C.R.S. 30-28-115(1). In Section 1 of the Resolution, the County stated that the resolution was enacted for the purposes set forth in the state statute. Additionally, the A-2 district was established to allow for areas for "general farming, ranching, intensive agricultural uses and agriculturally related uses while protecting the surrounding land from any harmful effects." To effectuate that purpose, the County prohibited land within an agricultural district to be used for institutional purposes, such as churches and schools. The uses permitted within an A-2 district are

rationally related to the purpose of maintaining an agricultural district.

B. The 1976 Zoning Resolution

The plaintiffs argue that the 1976 amendment to the A-2 regulation is invalid on procedural due process grounds because the special use provisions involve an unconstitutional delegation of discretionary power to the decision-making body. The plaintiffs urge this court to invalidate the resolution under *Beaver Meadows v. Board of County Commissioners*, 709 P.2d 928 (1985). There, a developer submitted a proposal to create a planned unit development ("PUD"). The Board of County Commissioners of Larimer County conditioned approval of the PUD on the developer providing improvements to an access road and providing for emergency medical services. The court first considered whether the state had authorized the county to consider the adequacy of access in evaluating a PUD application. After concluding that it had, the court then considered whether the county had exercised its statutory authority by enactment of regulations sufficiently specific to impose the condition of road access improvements. The court explained that "there must be sufficient standards and procedural safeguards involved in the delegation and subsequent implementation to ensure that any action taken by a county in response to a land use proposal will be rational and consistent and that judicial review of that action will be available and effective. *Id.* at 936. This principle is satisfied if "the general standards and requirements for county land use planning and control outlined in the state statutes and encompassing the relevant subject matter, when *coupled with* the procedural protections in the state statutes *and*

with the regulations at the county level, are sufficiently detailed to provide all users of land with notice of the particular standards and requirements imposed by the county for PUD approval." *Id.* at 936.

The court stated that although the state statutes authorized the county to consider road access in approving a PUD application, standing alone, they were too general to serve as authority for such a requirement. Turning to an examination of the county regulations, the court concluded that they were sufficiently detailed to reflect the intent that the Board consider the adequacy of access roads. However, the court held that the regulations were not sufficiently definite to implement that intent. "The regulations are devoid of standards by which the adequacy of an access road can be evaluated and remedial measures prescribed. There are no criteria with respect to design considerations such as grades, sight distances, width, shoulders, vertical or horizontal curves, drainage, or types of surfaces." *Id.* at 397.

Under the analytical framework of *Beaver Meadows*, the 1976 resolution does not involve an unconstitutional delegation of discretionary power. First, it is clear that the state statutes and county regulations contemplate that the Board may consider various factors in regulating land use. The county is specifically authorized to classify land uses and distribute land development and utilization. C.R.S. 30-28-115(1). Section 1 of the county zoning resolutions provides that the resolutions are:

> enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of

> Jefferson County by lessening the congestion in streets or roads, securing safety from fire and other dangers, providing light and air, avoiding undue congestion of population, facilitating the adequate provision of transportation, water, sewage, schools and other public requirements, securing protection of the tax base, and by other means in accordance with a Comprehensive Plan.

Secondly, while the state statutes are too broad to be used as decisional criteria upon which to evaluate a special use application, the county regulations provide greater detail. The resolution provides that the intent of the A-2 classification is "to allow areas for general farming, ranching, intensive agricultural uses and agriculturally related uses while protecting the surrounding land from any harmful effects." This language is given meaning, and the Board is given guidance, by the specific requirements set forth in the A-2 district regulation. On land abutting a residential district, for example, no use is permitted which causes objectionable odor or dust. All sanitation systems must be approved by the Jefferson County Health Department. There are lot size and width requirements, and setback regulations. These specific requirements are sufficiently definite to enable the Board to implement the intent behind the resolution to provide an agricultural district within the county, and to provide owners of land with notice of standards for use of their land. It is noteworthy that the denial of the special use application by the Planning Commission was judicially reviewed in this court and found to be rational and consistent with the county's land use planning and control. Accordingly, the 1976

resolution is not invalid on procedural due process grounds.

Upon the foregoing, it is

ORDERED that the plaintiffs' motion for summary judgment is denied, and it is

FURTHER ORDERED that the defendants' motion for summary judgment is granted and this civil action is dismissed.

Dated: April 21st, 1987

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Judge

(Filed April 22, 1987)

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

CASE NUMBER: 80-M-764

MESSIAH BAPTIST CHURCH, et al.,
Plaintiffs,

v.

THE COUNTY OF JEFFERSON, STATE OF COLORADO, et al.,
Defendants.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered. Pursuant to the Memorandum Opinion and Order, entered by United States District Judge Richard P. Matsch on April 21, 1987,

IT IS ORDERED AND ADJUDGED that the plaintiffs' motion for summary judgment is denied, and it is FURTHER ORDERED that the defendants' motion for summary judgment is granted and this civil action is dismissed.

April 21, 1987
Date

James R. Manspeaker
Clerk
/s/ Jacob Gilmore
(By) Deputy Clerk

Case Number: 80-M-764

I certify that I mailed a copy of the attached to the following:

Dated: 4-21-87

Ronald S. Loser
J. Scott Needham
1512 Larimer St., #650
Denver, CO 80202

Messiah Baptist Church
3241 West 44th Avenue
Denver, CO 80211

Tom Moore
Ardel Moore
Donna L. Nive
Jess Paulsen
c/o Messiah Baptist Church
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Gay B. Ummel
Assistant County Attorney
Jefferson County Courthouse
1700 Arapahoe Street
Golden, CO 80419

H. Lawrence Hoyt
1700 Araphoe Street
Golden, CO 80419

James R. Manspeaker, Clerk
By: /s/ Jacob Gilmore
Jacob Gilmore, Deputy Clerk
Terri A. Smethers, Secretary

SECTION 1 OF THE JEFFERSON COUNTY ZONING RESOLUTION

SECTION 1: PURPOSE

In pursuance of the authority converred by Chapter 92, Session Laws of Colorado, 1939, this Resolution is enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of Jefferson County by lessening the congestion in streets or roads, securing safety from fire and other dangers, providing light and air, avoiding undue congestion of population, facilitating the adequate provision of transportation, water, sewage, schools and other public requirements, securing protection of the tax base, and by other means in accordance with a Comprehensive Plan. (Orig. 5-6-46)

May 6, 1946

JEFFERSON COUNTY A-2 ZONING RESOLUTION AS OF 1972

SECTION 10: A-2 AGRICULTURAL TWO DISTRICT

A. USE REGULATION

No building or land shall be used and no building shall be hereafter erected, converted or structurally altered, unless otherwise provided herein, except for one or more of the following uses: (Orig. 5-6-46.)

1. Any use permitted in the A-1 (Agricultural One) District. (Orig. 5-6-46.)
2. Feeding of garbage to hogs. (Orig. 5-6-46.)
3. Feed lots. (Orig. 5-6-46.)
4. Fur farming, dog kennels, veterinary hospitals. (Orig. 5-6-46.)
5. Cemeteries and crematories, if approved by the Board of Adjustment as hereinafter provided. (Orig. 5-6-46.)

B. HEIGHT REGULATION

1. No dwelling shall exceed a height of thirty-five (35) feet. All buildings other than dwelling units shall not exceed a height of sixty-five (65) feet. (Orig. 5-6-46.)

C. AREA REGULATIONS

1. AREA AND MINIMUM WIDTH OF LOT. For every dwelling unit or other main building hereafter erected or structurally altered there shall be provided a minimum lot area of one (1) acre. For hospitals and sanitariums, there shall be provided a minimum lot area of one (1) acre. The minimum width of lot shall be one hundred forty

(140) feet for a dwelling, one hundred fifty (150) feet for a building other than a dwelling or a hospital or sanitarium and four hundred (400) feet for a hospital or sanitarium. (Orig. 5-6-46; Am. 7-16-56.)

2. FRONT YARD. The minimum depth of front yard for dwellings and other main buildings shall be thirty (30) feet. Private garages shall have the same front yard as the dwelling or other main building to which they are accessory. Accessory buildings housing livestock (including poultry and rabbits) shall be set back at least one hundred (100) feet from the front lot line. All other accessory buildings not otherwise listed herein shall be set back at least seventy-five (75) feet from the front lot line. (Orig. 5-6-46.)

3. SIDE YARD. The minimum width of side yard for all buildings shall be fifteen (15) feet on each side except that adjacent to a road, the minimum yard shall be thirty (30) feet, measured from the street side lot line. The minimum side yard for hospitals and sanitariums shall be one hundred (100) feet on each side. (Orig. 5-6-46.)

July 16, 1956

4. YARD ABUTTING RESIDENTIAL DISTRICT. In any property abutting a Residential District, no use causing an objectionable odor, noise or dust shall be permitted within five hundred (500) feet of the boundary of the Residential District. (Orig. 5-6-46.)

5. REAR YARD. The minimum depth of rear yard shall be five (5) feet. (Orig. 5-6-46.)

May 6, 1946

JEFFERSON COUNTY A-2 ZONING RESOLUTION AS OF OCTOBER 2, 1974 (SHOWING SUBSEQUENT AMENDMENTS BY DATE)

SECTION 10: A-2 AGRICULTURAL TWO DISTRICT

A. INTENT OF CLASSIFICATION

The Agricultural Two Zone District is designed to allow areas for general farming, ranching, intensive agricultural uses and agriculturally related uses while protecting the surrounding land from any harmful effects. (Orig. 3-6-72.)

B. USE REGULATION

No building or land shall be used and no building shall be hereafter erected, converted or structurally altered unless otherwise provided herein, except for one or more of the following uses. (Orig. 5-6-46; Am. 3-6-72.)

1. One family dwelling, private garage, barns, sheds, stables, silos, bunkhouses, corrals, pens and runs. (Orig. 3-6-72.)
2. General farming including grains, fruit, vegetables, grasses, hay, stock raising, and keeping of horses. (Orig. 3-6-72.)
3. Poultry hatcheries and farms, fish hatcheries, dairy farms. (Orig. 3-6-72.)
4. Greenhouses and nurseries, including both wholesale and retail, provided products sold are raised on the premises. (Orig. 3-6-72.)
5. Forestry farming including raising of trees for any purpose. (Orig. 3-6-72.)

6. Roadside stands for operation during not more than 6 months each year for the sale of farm products raised or produced on the premises, provided such stands are located not less than 30 feet distant from any street, highway or right-of-way line. (Orig. 3-6-72.)

7. Feed lots. (Orig. 5-6-46; Am. 3-6-72.)

8. Feeding of garbage to hogs. (Orig. 5-6-46; Am. 3-6-72.)

9. Fur farms and raising of rabbits. (Orig. 5-6-46; Am. 3-6-72.)

10. Dog kennels and catteries. (Orig. 5-6-46; Am. 3-6-72.)

11. Veterinarian hospitals. (Orig. 3-6-72.)

12. Cemeteries, mausoleums, mortuaries, and related uses. (Orig. 9-6-77.)

13. *Special Uses*: The following uses shall be permitted only upon approval of the Planning Commission and the Board of County Commissioners: (Orig. 3-6-72.)

    a. Railroad right-of-way. (Orig. 3-6-72.)

    b. Water supply reservoir, wells, water tower or filter beds, irrigation canal. (Orig. 3-6-72.)

    c. Sewage treatment plants. (Orig. 3-6-72.)

    d. Telephone exchange, electric substations, including electric transmission and distribution lines or gas regulator station where no repair or storage facilities are maintained. (Orig. 2-27-73.)

e. Churches, rectories, parish houses and church schools. (Orig. 7-21-76.)

C. HEIGHT REGULATION

No dwelling or building shall exceed a height of 35 feet. (Orig. 5-6-46; Am. 3-6-72.)

D. AREA, WIDTH OF LOT and SETBACK REGULATIONS

1. *Area and Minimum Width of Lot*: For every use listed herein, there shall be provided a minimum lot area of 10 acres. The minimum width of lot shall be 300 feet. (Orig. 5-6-46; Am. 7-16-56; Am. 3-6-72.)

2. *Front Yard*: The minimum depth of front yard for dwellings and private garages shall be 50 feet. Accessory buildings housing livestock shall be setback at least 75 feet from the front lot line. Feed lots, fur farms, poultry farms, garbage fed hog operations, kennels and catteries will be setback at least 100 feet from the front lot line. (This requirement includes all pens, runs or structures which are used or occupied in conjunction with these activities). All other accessory buildings not listed herein shall be setback at least 50 feet from the front lot line. (Orig. 5-6-46; Am. 3-6-72.)

3. *Side Yard*: The minimum width of sideyard for dwellings and private garages shall be 30 feet. Accessory buildings housing livestock shall be setback at least 75 feet from the side lot line. Feed lots, fur farms, poultry farms, garbage fed hog operations, kennels and catteries will be setback at least 100 feet from the side lot line. (This

requirement includes all pens, runs or structures which are used or occupied in conjunction with these activities.) All other accessory buildings not listed herein shall be setback at least 50 feet from the side lot line. (Orig. 5-6-46; Am. 3-6-72.)

4. *Rear Yard*: The minimum depth of rear yard shall be 50 feet for all buildings and structures. (Orig. 5-6-46; Am. 3-6-72.)

E. GENERAL REQUIREMENTS

1. In any property abutting a Residential Zone District, no use causing an objectionable odor, noise or dust shall be permitted within 500 feet of the boundary of the Residential District. (Orig. 5-6-46; Am. 3-6-72.)

July 21, 1976

2. The storage of manure shall not be permitted within one hundred (100) feet of the front lot line and fifty (50) feet of the side lot lines. (Orig. 3-6-72.)

3. The approval of the Jefferson County Health Department shall be obtained for all sanitation systems, runs, pens, corrals, or the location of any structure or area which houses livestock, poultry, grains, feed, or manure. (Orig. 3-6-72.)

4. Whenever dangerous or exotic animals are kept on the premises, adequate safeguards shall be provided. In the case of stallions, such animals shall be kept in a pen, corral, or run area enclosed by an eight (8) foot chain link fence, or material equal or greater in strength. (Orig. 3-6-72.)

March 6, 1972

JEFFERSON COUNTY ZONING RESOLUTION OF JULY 21, 1976 (AMENDING A-2 ZONING)

Commissioner Anderson moved that the following Resolution be adopted:

BEFORE THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF JEFFERSON
STATE OF COLORADO

RESOLUTION NO. CC76-203

Re: Amendments to Jefferson County Zoning Resolution
Section 9-B-10(e), Special Uses/A-1 Zone District
Section 10B-12(e), Special Uses/A-2 Zone District

WHEREAS, the subject amendments proposed to add as allowable Special Uses within the A-1 and A-2 Zone Districts, churches, rectories, parish houses and church schools; and

WHEREAS, as provided by law, the proposed amendments were referred to the Jefferson County Planning Commission and reviewed by said Planning Commission on the 26th day of May, 1976; and

WHEREAS, the Jefferson County Planning Commission did by formal resolution dated May 26, 1976, recommend denial of the proposed amendments together with instruction to the Planning Department to study the feasibility of creating a new and separate zone district category for regulation of the subject uses; and

WHEREAS, based on the evidence presented, the recommendations of the Planning Department, the County Attorney's Office, the resolution of the Planning Commission and the testimony from all interested parties, this Board finds as follows:

1. That notice of the public hearing before this Board was published in the Lakewood Sentinel as provided by law.

2. That all facts, matters and issues were presented and that all interested parties were heard at the public hearing.

3. That the proposed amendments were referred to the Jefferson County Planning Commission as provided by law.

4. That while study of the feasibility of creation of a new and separate zone district for regulation of the subject uses may be worthwhile, there is a more immediate need to provide for these subject uses under the existing Agricultural-One (A-1) and Agricultural-Two (A-2) Zone Districts as Special Uses.

5. That the proposed amendments as set forth below are an integral and necessary part of the Jefferson County Zoning Resolution.

6. That the enactment of the amendments as set forth are in the best interest of the health, safety, prosperity, and welfare of the present and future inhabitants of Jefferson County.

NOW, THEREFORE, BE IT RESOLVED that:

1. Section 9-B-10 of the Jefferson County Zoning Resolution be amended by the addition of a paragraph designated as (e) to read as follows:

   (e) Churches, rectories, parish houses and church schools.

2. Section 10-B-12 of the Jefferson County Zoning Resolution be amended by the addition of a paragraph designated as (e) to read as follows:

   (e) Churches, rectories, parish houses, and church schools.

Commissioner Clement seconded the adoption of the foregoing Resolution. The roll having been called, the vote was as follows:

Commissioner Hal Anderson	-"Aye";
Commissioner Robert F. Clement	-"Aye";
Commissioner Joanne K. Paterson, Chairman	-"Aye":

The Resolution was adopted by unanimous vote of the Board of County Commissioners of the County of Jefferson, State of Colorado.

DATED: July 21, 1976

STIPULATION OF FACTS

(Filed August 25, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 80-M-764

MESSIAH BAPTIST CHURCH, a Colorado non-profit corporation; THOM MOORE; ARDEL MOORE; DONNA L. NIVE; and JESS PAULSEN,

Plaintiffs,

vs.

THE COUNTY OF JEFFERSON, STATE OF COLORADO; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, STATE OF COLORADO; and HAL ANDERSON, BOB CLEMENT, and JAMES MARTIN, not individually but as the members of the Board of County Commissioners of the County of Jefferson, State of Colorado,

Defendants.

STIPULATION

The parties hereto, through their respective counsel, stipulate and agree as follows:

1. This stipulation is being entered into for the purpose of placing before this Court those undisputed facts which one, or the other, or both, of the parties view as material upon the legal issues raised by Plaintiffs', "Motion for Partial Summary Judgment," being simultaneously

filed herewith. It is not intended, however, that the execution of this stipulation shall preclude any of the parties from bringing to the Court's attention, by means of affidavits, or other appropriate form, any additional facts which any party may, separately, consider to be material and appropriate for consideration upon such motion. Should any party offer any additional facts for this Court's consideration upon such motion, this Court may consider whether the same are material or are undisputed in the same manner as the provisions of *F.R.C.P. 56* would otherwise dictate.

2. Simultaneously with the filing of this stipulation, the parties are filing with this Court a number of documents, all of which are agreed to be authentic. The parties further agree that this Court may consider the same to the extent that it deems them, or any of them, to be relevant or material, to the issues presented. For purposes of identification, these documents have been placed in several separate packets and indexed. A copy of that index is attached hereto.

3. To the extent that the contents of any of those documents disclose factual statements inconsistent with the following statement, the contents of those documents will supersede the statements contained below. However, it is agreed that the following constitutes a reasonably accurate, factual summary of the events involved:

a. The Messiah Baptist Church (the "Church") acquired a parcel of ground, located in Jefferson County ("County") and containing approximately 80 acres, in July, 1974. Its purpose was to use this ground to erect a new church and other facilities, since the facilities then occupied by it were being acquired by means of the ex-

ercise of the power of eminent domain, by the City of Lakewood, Colorado.

b. At the time of its acquisition, and continuously since that time, this land was, and has been, zoned "A-2" by the County. Until 1976, the regulations governing this zone district did not permit the use of the same for a church or other religious structure. The uses by right, authorized in this district, was limited to single-family dwellings, various types of farms, greenhouses, roadside stands for the sale of farm products, animal buildings, public or private parks or golf courses, veterinarian hospitals, cemeteries and mortuaries. In addition, certain other uses, such as sewage treatment plants and telephone and electric substations, were allowed as "special uses" but only upon review by the Planning Commission and approval by the Board of County Commissioners.

c. In late September or early October, 1974, the Church applied to the appropriate County official for a permit to erect a single structure on this ground, which was intended to be used for worship purposes, for the Church's administrative offices and for school purposes. The County presently has no records which would reflect the Church's application or the plans submitted at that time. However, it is agreed that the application for a building permit was denied and that, on or about October 2, 1974, the County's Zoning Administrator advised the Church that its application had been denied because, since March 2, 1972, the A-2 zone district did not permit the use of this land for a church or church school. Shortly thereafter, the Church attempted to appeal this decision to the Board of County Commissioners, but the parties have been unable to discover any evidence that the Board ever took any direct action upon that appeal.

d. On or about, July 21, 1976, the Board of County Commissioners amended the provisions of the A-2 zone district regulations, so as to authorize the use of land within this district for a "church, rectory, parish house and church school," as a "special use," subject to review by the Planning Commission and approval by the Board.

e. Shortly thereafter, the Church filed an application for such a "special use" and, in doing so, submitted a preliminary development plan, indicating the Church's ultimate intent for the development of the entire 80-acre parcel. On October 13, 1976, however, the Planning Commission vacated this application, at the Church's request, in order to allow further investigation and preparation by the Church.

f. In April, 1978, the Church filed a second "special use application," limiting its request to only 10 acres of the overall 80-acre parcel. In its request, the Church sought zoning approval for the erection of a single, 12,000 square foot structure, which was designed to be used for worship services, administrative offices, classrooms and recreational (gymnasium) purposes. In conjunction therewith, it proposed a parking area for some 151 vehicles and an additional area, referred to as an "amphitheater," where worshippers could park and, without leaving their cars, listen to the religious services, through means of individual sound transmission devices similar to those utilized by "drive-in" movie theaters.

g. On May 10, 1978, a public hearing was held before the Planning Commission upon the Church's application and on June 14, 1978, the Planning Commission voted to deny the same. The reasons for such

denial were reduced to writing and consisted of the following:

i. "The proposed church operation, including a school, amphitheater, and gymnasium complex contemplates an intensity of use which is normally associated with commercial-type operations";

ii. "This full-service ministry is therefore distinguishable in nature from the more common ministries which serve small neighborhood congregations";

iii. "The proposal does not fit within the special use provision of the Zoning Resolution which allows for less intense type uses, which would be acceptable in an Agricultural Zoned District";

iv. "Traffic generated by the uses such as school, amphitheater, gymnasium, and full-time church complex, particularly one using a multitude of church-school busses for transportation to and from the complex would be too great to allow the development to be compatible with the adjoining residential area, particularly since whatever access could be arranged would most likely be routed through such neighborhood";

v. "The access problem has not been resolved. The proposal for access via residential streets are unacceptable due to the health, safety risk imposed by adjacent residents";

vi. "Fire protection for the site is wholly inadequate";

vii. "Erosion hazards exist in the area due to the nature of the soils and topography would be

greatly increased in the proposed intensive development"; and

viii. "Lakewood does not grant access to the streets, through what amounts to easements through adjacent properties."

h. On or about August 9, 1978, counsel then representing the Church gave written notice to the County of a possible claim against it, purportedly pursuant to the provisions of *C.R.S. 24-10-109,* which requires the filing of such notice with the local governmental unit by any person who claims "to have suffered an injury by a public entity. . ."

i. In February, 1979, the holder of the purchase price promissory note threatened to foreclose upon the deed of trust upon the 80-acre parcel, which secured the payment of that note, and, on March 11, 1979, the Church executed and delivered to the note holder a quit-claim deed in lieu of foreclosure.

j. On or about July 30, 1979, the Church, as sole plaintiff, instituted an action against both Jefferson County and the City of Lakewood in the District Court in and for the County of Jefferson, State of Colorado. In its Complaint filed with that court, the Church alleges, essentially, that the County's actions, hereinabove summarized, denied to the Church, as an entity, its right to due process and its right to freedom of religion; and that the City of Lakewood concurrently undertook actions equally violative of the Church's rights.

k. In response to their Complaint, both the County and the City filed motions to dismiss on the grounds, among others, that the Court lacked jurisdiction over the subject matter of the Church's claim.

l. On or about February 7, 1980, the District Court entered a written order, dismissing the Church's complaint and explaining that Court's reasons for such dismissal. In that order, that court noted, inter alia, the following:

i. That, in that litigation, the Church "was not challenging the constitutionality of any ordinance or statute which might be relevant to the Planning Commission's decision on its application";

ii. That the Church's claims arose "from actions of the Planning Commission in denying [the Church's] application for a special use building permit," which denial was in the exercise of the Commission's "quasi-judicial authority";

iii. Under such circumstances, the provision of *C.R.C.P. 106(a)(4)* provided to the Church its "exclusive remedy," but that Rule required an action to be commenced within 30 days after the Commission's "final action";

iv. The Commission's "final action" took place on June 14, 1978; thus, "the time for perfecting [the Church's] appeal" under *Rule 106(a)(4)* had long since passed before its Complaint was filed with the Court;

v. The Church cannot "collaterally attack" the County's actions after failing to follow the *Rule 106 (a)(4)* provisions for a direct review; and

vi. The Church's failure to commence suit within 30 days, and its failure to join the Planning Commission, itself, within that time period, "constitutes a jurisdictional defect mandating the dismissal of [the Church's] Complaint."

m. On or about February 26, 1980, the Church filed a motion for rehearing, which was denied on March 25, 1980. No appeal was taken from that order of dismissal within the time provided by state law and the parties hereto agree that that order has become final.

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No. 88-1119

In the Supreme Court of the United States

OCTOBER TERM, 1988

MESSIAH BAPTIST CHURCH, a Colorado non-profit corporation; THOM MOORE; ARDEL MOORE; DONNA L. NIVE; and JESS PAULSEN,
Petitioners,

vs.

THE COUNTY OF JEFFERSON, STATE OF COLORADO; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, STATE OF COLORADO; HAL ANDERSON, BOB CLEMENT, and JAMES MARTIN, not individually but as members of the Board of County Commissioners of the County of Jefferson, State of Colorado,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the 1974 Jefferson County Zoning Resolution precluding churches as a use by right in an Agricultural-Two (A-2) Zone District is constitutional on its face under the Due Process Clause of the Fourteenth Amendment?

2. Whether the 1974 Jefferson County Zoning Resolution precluding churches as a use by right in an Agricultural-Two (A-2) Zone District on its face does not unduly infringe on the First Amendment right of free exercise of religion?

3. Whether the Jefferson County Zoning Resolution as amended in 1976 on its face provides constitutionally adequate standards to guide the decision-making body in determining whether to grant a special use for a church in an A-2 Zone District?

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CONSTITUTIONAL PROVISIONS, STATUTES AND ZONING REGULATIONS INVOLVED

U.S. Constitution amend. I. Petition at p. 3.

U.S. Constitution amend. XIV, §1. Petition at p. 3.

Section 30-28-115, C.R.S.

Public welfare to be promoted - legislative declaration - construction. (1) Such regulations shall be designed and enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity, or welfare of the present and future inhabi-

tants of the state, including lessening the congestion in the streets or roads or reducing the waste of excessive amounts of roads, promoting energy conservation, securing safety from fire, floodwaters, and other dangers, providing adequate light and air, classifying land uses and distributing land development and utilization, protecting the tax base, securing economy in governmental expenditures, fostering the state's agricultural and other industries, and protecting both urban and nonurban development.

Section 24-67-101, et seq., C.R.S. See p. A1, *infra*.

Jefferson County Zoning Resolution, Section 1.

In pursuance of the authority conferred by Chapter 92, Session Laws of Colorado, 1939, this Zoning Resolution is enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of Jefferson County by lessening the congestion in streets or roads, securing safety from fire and other dangers, providing light and air, avoiding undue congestion of population, facilitating the adequate provision of transportation, water, sewage, schools and other public requirements, securing protection of the tax base, and by other means in accordance with a Comprehensive Plan. (orig. 5-6-46)

Jefferson County Zoning Resolution, Section 10, Agricultural-Two (A-2) Zone District in effect prior to the amendment on March 6, 1972. Petition at p. A47.

Board of County Commissioners' Resolution adopted March 6, 1972, amending Section 10, Agricultural-Two (A-2) Zone District. See p. A2, *infra*.

Jefferson County Zoning Resolution, Section 10, Agricultural-Two (A-2) Zone District in effect in 1974. Petition at p. A49.

Board of County Commissioners' Resolution adopted July 21, 1976 amending Section 10, Agricultural-Two (A-2) Zone District. Petition at p. A53.

STATEMENT OF THE CASE

In July, 1974 the Messiah Baptist Church purchased an 80-acre parcel of land in Jefferson County which was zoned Agricultural-Two (A-2). At the time the property was purchased churches or other religious event centers were not permitted in the A-2 zone district. One family dwellings were permitted with minimum lot sizes of 10 acres along with other general ranching, intensive agricultural use and agriculturally related uses. Petition at pp. A2-3.

In March of 1972 the County had amended the residential and agricultural zone districts to differentiate clearly between agricultural districts, where true and relatively unfettered agricultural uses are allowed, and small lot residential subdivision districts. The A-1 and A-2 Zone Districts regulations were amended to delete the incorporation of the permitted uses in the R-1 Zone District. The institutional uses previously incorporated into the agricultural districts by reference from the R-1 Zone District, such as schools, libraries, museums, and parks together with churches and parish houses, were deleted as permitted uses from the agricultural districts. Petition at p. A49.

While the residential districts either precluded large animals or retained their limitations upon the numbers

and area requirements, the agricultural districts had no such limitations or area requirements. The minimum lot area for the agricultural districts was increased from one (1) acre to five (5) and ten (10) acres respectively for A-1 and A-2. Petition at p. A51.

The Board's recognition of the potential incompatibility of the uses in residential and agricultural districts is reflected in the resolution adopting these amendments. It states in part, "Whereas, after adoption hereof, further implementation of the following amendments will be required for the purpose of providing proper residential zoning in areas that are, in fact, residential subdivisions, not agricultural orientated areas." See p. A3, *infra.*

Sometime in September or October, 1974, the County denied the application of the Church for a building permit on the basis that a church and religious events center was not a permitted use in an A-2 Zone District. At that time churches were, however, permitted in thirteen (13) residential zone districts throughout the County.

In 1976 the County amended its Zoning Resolution to permit churches as a special use in the agricultural zone districts if approved by the Planning Commission and the Board of County Commissioners. Petition at p. A53. The Church applied for a special use in 1976, withdrew its application and then reapplied under the same special use provision in April, 1978. The Church in 1978 sought approval for the erection of a 12,000 square foot structure on ten (10) acres designed to be used for worship services, administrative offices, class rooms and recreational (gymnasium) purposes. In conjunction therewith, it proposed a parking area for some *151 vehicles* and an *additional area,* referred to as an *"amphitheater",* where wor-

shipers could park and, without leaving their cars, listen to the religious services, through means of individual sound transmission devices similar to those utilized by "drive-in" movie theaters. Petition at p. A59.

On June 14, 1978, the County denied the Church's special use application stating nine grounds for denial including access problems, erosion hazards and inadequate fire protection. Petition at p. A60.

In July, 1979, the Petitioners filed a state action which was dismissed because the action had not been brought within thirty days of the County's final action as required by Colorado law. No appeal was taken from the order of dismissal. Petition at p. A62.

In June, 1980 Petitioners brought this suit in United States District Court for the District of Colorado under 42 U.S.C. §1983. On June 2, 1982, the District Court granted the County's Motion for Summary Judgment holding that claims prior to June 14, 1978, were time barred and upholding the County's denial of the Church's special use application in 1978 for the reason that the denial was based upon valid, neutral criteria, which were fairly applied. Petition at p. A35. The Church did not appeal the ruling on the constitutionality of the County's denial of the Church's special use application in 1978 and that decision is final. The Tenth Circuit only reversed the District Court's finding that the claims arising prior to 1978 were time barred.

On remand the District Court granted the County's Motion for Summary Judgment holding that neither the 1974 Zoning Resolution nor the 1976 Zoning Resolution infringed on the Petitioners' First Amendment religious freedoms. The District Court upheld the 1974 Zoning Resolution excluding churches from the A-2 zone dis-

trict on the basis that the classification of uses permitted within an A-2 zone district is rationally related to the purpose of maintaining an agricultural district. The Court further held that the 1976 Zoning Resolution had sufficiently detailed standards for review of special uses and was not invalid as a violation of procedural due process.

The Tenth Circuit affirmed the District Court decision on the same basis but also finding that there was no alternative means for the County to accomplish its purposes under its zone district plan.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE TENTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED WELL ESTABLISHED CONSTITUTIONAL STANDARDS TO THE FACTS OF THIS CASE AND THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW OF THIS CASE BY THE UNITED STATES SUPREME COURT.

A. The Tenth Circuit Properly Found There Was No Infringement Upon A Protected Liberty Interest And Upheld The Provisions Of The 1974 A-2 Zoning Regulation As Substantially Related To The Health, Safety, And General Welfare Of The Citizens Of Jefferson County.

This Court should not take jurisdiction in this case for the very simple reason that Petitioners never suffered any infringement of their First Amendment rights, much less a substantial or significant infringement.

This Court has previously held that religious uses of land are subject to local zoning authority. *Tony & Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290, 305 (1985) and *Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971). Activities of individuals, even when religiously based, may be subject to regulation in the exercise of the government's power to promote the health, safety and general welfare. *Wisconsin v. Yoder, Id.* 406 U.S. 205, 220 (1972).

A legislative decision concerning the classification of land uses and their placement is necessary, in fact is the *sine qua non* of zoning regulation. If one can be exempt from the use regulations of a zoning ordinance due to the fact that the conduct or activities taking place are required as part of one's practice of religious worship, the ability to plan and zone falls apart. And, as stated by Justice Marshall in *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974),

> I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. 416 U.S. at 13 (Marshall, J. dissent).

Thus, it can be seen that, where use classifications and prohibitions incidentally affect religious freedoms, they are nonetheless justified as necessary to accomplish a substantial state interest. "If the legislative judgment is fairly debatable, the legislative judgment must be allowed to control." *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388 (1926).

This Court has noted that "the power of local governments to zone and control land is undoubtedly broad and

its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." *Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981). Even when property rights are adversely affected this Court has emphasized the breadth of local government power to control land use, sustaining a regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of its property. *Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981); *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974); and *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395 (1926). Only if the zoning law infringes upon a protected liberty must it be narrowly drawn and further a substantial governmental interest. *Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981).

The Tenth Circuit followed the precedent of this Court, in determining that the 1974 County Zoning Resolution did not infringe on the Petitioners' First Amendment right to free exercise of religion. The Tenth Circuit noted the dichotomy set forth in *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940), that while religious beliefs cannot be subject to regulation, conduct in accord with such beliefs can be, and proceeded to analyze whether the A-2 zoning regulation regulated religious beliefs as opposed to religious conduct.

The Petitioners admitted their church has continued to operate and they have been able to worship as they choose. Petition at p. A37. The Tenth Circuit correctly held that the A-2 zoning regulation did not regulate religious beliefs or coerce members of the church to violate their religious beliefs. Petition at p. A9. The decision where to locate the Church in this case is not rooted

in religious belief but involves only secular, philosophical or personal choice. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972); *Sherbert v. Verner*, 374 U.S. 398, 412 (1963).

The Tenth Circuit considered whether the 1974 A-2 zoning regulation placed *any* burden on the Petitioners' free exercise of their religion. It held that there was no evidence in the record that the purpose or the effect of the zoning regulation was to impede observance or discriminate between religions. *Braunfield v. Brown*, 366 U.S. 599 (1961). The only possible burden was a potential indirect burden of making the practice of religion more expensive by requiring the church to purchase other property. This Court has repeatedly held that economic detriment does not invalidate a zoning regulation even in cases considering violations of the First Amendment guarantee of freedom of speech. See *Young*, 427 U.S. 50, 78 (Powell, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact . . .") and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1986) ("That respondents must fend for themselves in the real estate market on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation.") See also *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), cert. denied, 464 U.S. 815 (1983). Thus the Tenth Circuit applied the correct standard.

The Petitioners argue that the Tenth Circuit should have found the A-2 zoning regulation infringed on a protected liberty (free exercise of religion) and applied the strict scrutiny standard as applied in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). That case, how-

ever, involved a zoning regulation which totally precluded a use (live entertainment) within the community and was held to violate the First Amendment right to freedom of speech. In *Schad,* 452 U.S. 61 at 71, this Court noted the distinction between a regulation which totally precludes a use and a regulation which is a "minimal burden" on protected speech. This Court distinguished *Young v. American Mini-Theatres, Inc.,* 427 U.S. 50, on the basis that the zoning regulation in *Young* did not preclude adult theaters but merely dispersed them and was therefore not an infringement on the First Amendment. Like the *Young* case, this case does not involve a total preclusion of churches from the county. The county permitted churches as a use by right in 13 residential zone districts.[1]

The First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." As noted by this Court in *Lyng v. Northwest Indian Cemetery Protective Ass'n.,* ..... U.S. ....., 108 S.Ct. 1319, 1326 (1988) "prohibiting" is the crucial word:

> This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.

---

1. Petitioners' assertion that this Court should endorse *City of Englewood v. Apostolic Christian Church,* 362 P.2d 172 (Colo. 1961) is to no avail. That case involved a total ban of churches from most districts in the city, *Bethlehem Evangelical Lutheran Church v. City of Lakewood,* 626 P.2d 668, 675 (Colo. 1981), and has been partially overruled, *City of Colorado Springs v. Blanche,* 761 P.2d 213, 217 (Colo. 1988).

In this case there was not even an "incidental effect" on the ability to practice religion. The Church purchased the property in 1974 with knowledge that the zoning did not permit churches. The Church was free to purchase land and construct a church within any of thirteen (13) other zone districts which permitted churches as a use by right in the County.

The Tenth Circuit properly held that the 1974 A-2 Zoning Resolution did not infringe on the Petitioners' religious freedom and upheld the regulation under the Due Process test set out in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365. The County's zoning regulation was clearly not arbitrary or capricious and was substantially related to the public health, safety, morals and general welfare.

The Petitioners contend that the Tenth Circuit should have applied the time, place, and manner test used in free speech and assembly cases to determine the constitutionality of the zoning regulation. The test applied to time, place and manner regulations, however, is not substantially different from the test applied by the Tenth Circuit. The tests weigh similar, if not identical, factors and analysis of the 1974 A-2 zoning regulation under the time, place and manner case law will not invalidate the zoning regulation.

Zoning regulations which affect and restrict the location of the exercise of the fundamental right of free expression, but do not preclude such exercise have been upheld by this Court under the time, place and manner test. In *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 62-63, this Court applied the reasonable time, place and manner test and upheld the city's interest in prohibiting First Amendment activities from certain lo-

cations within the municipality, where those regulations were necessary to further a significant government interest, namely the interest in planning and regulating the use of property. See also *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).

More recently, in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) this Court applied the time, place and manner test to uphold a zoning ordinance that regulated the location of adult theaters. The Court held that since the zoning regulation was content neutral, the proper inquiry was whether the ordinance is designed to serve a substantial governmental interest and allows for reasonable alternatives or avenues for communication, 475 U.S. 41, 50. Both in *Young*, 427 U.S. at 71 and 80, and *City of Renton*, 475 U.S. 41, and in other cases previously cited, this Court has held that the local government's interest in regulating land use is substantial.

The Tenth Circuit in this case held that the County zoning regulations precluding churches from agricultural zone districts bore a substantial relationship to the general welfare of the residents of Jefferson County. Petition at p. A7. The regulation also allows for reasonable alternatives for locating a church within Jefferson County since there are thirteen (13) residential zone districts within the County which permit churches as a use by right. Given the similarity in criteria between free speech and assembly cases which address time, place and manner restrictions and the analysis by the Tenth Circuit, there is no reason for this Court to reexamine the existing precedent.

Recognizing that a dismissal of an appeal by this Court is a decision on the merits, *Hicks v. Miranda*, 422

U.S. 332, 343-45 (1975), this Court has upheld zoning regulations which exclude churches from certain residential zone districts but permit churches in other residential and use districts notwithstanding assertions of First Amendment rights. *Corporation of the Presiding Bishops of the Church of Jesus Christ of Latter Day Saints v. City of Porterville,* 90 Cal.App.2d 656, 203 P.2d 823 (4th Dist. 1949), appeal dismissed for want of substantial federal question, 338 U.S. 805 (1949) and *Minney v. Azusa,* 164 Cal.App.2d 12, 330 P.2d 255 (1958), appeal dismissed, 359 U.S. 436 (1959).

In *Porterville,* the court sustained the zoning regulation on the basis that the regulation did not violate the Free Exercise Clause or the Due Process Clause. The lower court in *Porterville* held the zoning regulations bore a substantial relation to the public health, safety, morals and general welfare. 203 P.2d at 825.

In *American Communications Association v. Douds,* 339 U.S. 382, 397-398 (1950) this Court referred to its holding in *Porterville*:

> When the effect of a statute or ordinance upon the exercise of First Amendment freedom is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the nations is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas.

This Court also has dismissed, for want of substantial federal question, several other appeals from state

court decisions upholding the validity of zoning ordinances such as the one involved in this case. See *Allendale Congregation of Jehovah's Witnesses v. Grosman*, 30 N.J. 273, 152 A.2d 569 (1959) (per curiam), appeal dismissed, 361 U.S. 536 (1960) (denial of permit to build church did not violate First Amendment where church could not comply with regulations governing parking); *Damascus Community Church v. Clackamas County*, 45 Or.App. 1065, 610 P.2d 273, rev. den., 289 Or. 588 (1980), appeal dismissed, 450 U.S. 902 (1981) (no First Amendment prohibition against preventing church from operating a parochial school in its church building).

This Court has established the standard by which land use regulations which place little or no economic burden on First Amendment rights are to be assessed. In this case there was no interference with the Congregation's ability to continue to worship and practice their religious beliefs. Review of this case would turn on the specific factual considerations presented, having little, if any, general application or impact.

B. The 1976 Zoning Resolution Provides Constitutionally Adequate Standards To Guide The Discretion Of The Decision-Making Body To Consider Churches As A Special Use In An A-2 Zone District.

The Petitioners concede the County Planning Commission did in fact apply valid criteria in rendering its decision denying the church as a special use. Petition at p. 16. The Petitioners initially challenged the special use provisions of the 1976 Zoning Resolution both on its face and as applied to the Church. The U.S. District Court for the District of Colorado held the denial of the special

use application for a church was based on valid, neutral criteria fairly applied to the Church property. Petition at p. 7 and at p. A35. The Petitioners did not appeal that determination and so it is now final.

The Petitioners challenge the 1976 Zoning Resolution on its face only. This issue does not warrant review by this Court. The Tenth Circuit properly held under the facts of this case there was no infringement of First Amendment rights and therefore there was no requirement that heightened scrutiny be applied in reviewing the adequacy of standards for review and determination of special uses.

Many state courts including Colorado have held that inclusion of churches in a particular zone district as a special use requiring such review and approval does not deny the right to freedom of worship guaranteed by the state and federal constitutions. *City of Colorado Springs v. Blanche,* 761 P.2d 213 (Colo. 1988); *Holy Spirit Association v. Town of New Castle,* 480 F.Supp. 1212, 1215 (S.D. N.Y. 1979); *Abram v. City of Fayetteville,* 281 Ark. 63, 661 S.W.2d 371 (1983); *State v. Maxwell,* 62 Haw. 556, 617 P.2d 816 (1980); *Archdiocese of Portland v. County of Washington,* 254 Or. 77, 458 P.2d 682 (1969); *Milwaukee Company of Jehovah's Witnesses v. Mullen,* 214 Or. 281, 330 P.2d 5 (1958); *West Hartford Methodist Church v. Zoning Board of Appeals,* 143 Conn. 263, 121 A.2d 640 (1956); *Appeal of Trustees of Congregation v. Swift,* 183 Pa.Super. 219, 130 A.2d 240 (1957); *Sexton v. Bates,* 17 N.J.Super. 246, 85 A.2d 833 (1951).

The designation of a use within a zone district as a special use under Colorado law is a legislative determination that a use may be compatible with other permitted uses but because the special use may be incompatible in certain respects with other uses within the zone, special

permission is required before the land may be put to that use. *Elam v. Albers,* 44 Colo.App. 281, 616 P.2d 168 (1980).

Here, as the Tenth Circuit held, there were substantial reasons for questioning the compatibility of churches or other public institutional uses with the unfettered agricultural and ranching uses otherwise allowed in the A-2 Zone District. Thus, it is reasonable that, if churches are to be allowed at all in such a district, such use be permitted only after review and approval of the specific location and site plan of the applicant.

Since a decision on a special use involves a determination of whether a given use is appropriate for a specific piece of property, i.e. whether those uses will be compatible with the surrounding land uses, the specific criteria established by the Colorado legislature for zoning decisions should be applied. The Tenth Circuit properly held that the Colorado legislature had adopted comprehensive legislation establishing adequate standards to be followed in enacting zoning regulations and classifications, and that these standards along with the standards set forth in the Jefferson County Zoning Resolution were adequate to guard against arbitrary and capricious operation in special use determinations. Petition at pp. A13 to A16.

Both Section 30-28-115 of the Colorado Revised Statutes and Section 1 of the Jefferson County Zoning Resolution, set forth such criteria as traffic congestion, fire or other safety hazards, adequacy of public facilities and conformity with the comprehensive plan. These standards have been found adequate for zoning decisions by the appellate courts of Colorado. *Snyder v. City of Lakewood,* 189 Colo. 421, 542 P.2d 371 (1975);

Cottonwood Farms v. Board of County Commissioners of Jefferson County, 725 P.2d 57 (Colo.App. 1986), aff'd, 763 P.2d 551 (Colo. 1988) and *Western Paving Construction Co. v. Board of County Commissioners of Jefferson County,* 689 P.2d 703 (Colo.App. 1984).

Standards virtually identical to those set forth in Section 30-28-115, C.R.S. and Section 1 of the Jefferson County Zoning Resolution were upheld by the Oregon Supreme Court in *Milwaukee Company of Jehovah's Witnesses v. Mullen,* 330 P.2d 5 at 9, 17. In *Thurston v. Cache County,* 626 P.2d 440 (Utah 1981), the Court held that the standard there, " 'the proposed use will not be detrimental to the health, safety, or general welfare of persons residing in the vicinity, or injurious to property in the vicinity' ", was adequate. In *Thurston, supra,* the court concluded:

> [1] While it is true that a zoning ordinance must set some ascertainable boundaries on the exercise of discretion by a zoning authority, such boundaries are not required to be unduly rigid or detailed. A generalized exposition of overall standards or policy goals suffices to direct the inquiry and deliberation of the zoning authority, and to permit appellate review of its decision. Thus, courts have upheld ordinances which permit conditional use permits "where the use will be in keeping with the uses authorized in the district," where the zoning authority was required to consider harmony with the neighborhood and the district, or where the zoning authority was required to consider the suitability of the property, character of the neighborhood, and economic or aesthetic effects of the proposed use. (Citations omitted) 626 P.2d at 444.

The Petitioners rely solely on *Beaver Meadows v. Board of County Commissioners,* 709 P.2d 928 (Colo. 1985), for their premise that the zoning regulations lack adequate standards for special use decisions. That case dealt with a specific type of zoning decision, approval of a planned unit development, for which the legislature required there to be regulations to "set forth standards and conditions by which a planned unit development shall be evaluated." Planned Unit Development Act of 1972, §24-67-101 et seq. C.R.S. (1982 Repl. Vol.). See p. A1, *infra.* There is no equivalent statute for special uses or other rezoning decisions.

Although *Beaver Meadows* dealt with the Planned Unit Development Act, it did state the standard for delegation of discretionary power in land use decisions.

> ". . . there must be sufficient standards and procedural safeguards involved in the delegation and subsequent implementation to ensure that any action taken by a county in response to a land use proposal will be rational and consistent and that judicial review of that action will be available and effective."

Beaver Meadows at 936.

The Tenth Circuit applied this standard and properly held that the 1976 Zoning Resolution providing for churches as a special use in A-2 zone districts, was not an unconstitutional delegation of discretionary power and that it contained sufficient standards to guard against arbitrary and capricious operation.

Moreover the provisions of the Jefferson County Zoning Resolution providing for review and approval of special uses have been amended. Therefore, any decision rendered by this Court on the standards for special use approval would have no precedential value.

II.

THE DECISIONS IN THE SIXTH, TENTH AND ELEVENTH CIRCUITS DO NOT CONFLICT WITH A HOLDING IN THE FIFTH CIRCUIT.

All of the decisions cited by the Petitioners from the Fifth, Sixth, Tenth and Eleventh Circuits follow the precedent of this Court and there is no conflict between the decisions.

The Sixth and Eleventh circuit cases, *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood,* 699 F.2d 303 (6th Cir. 1983), cert. denied, 464 U.S. 815 (1983) and *Grosz v. City of Miami Beach,* 721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984), and the Tenth Circuit decision in this case all uphold zoning ordinances which exclude church buildings or regular worship services in homes from residential zone districts on the basis that zoning ordinances serve a legitimate public purpose and do not violate the First Amendment where such ordinances place only an incidental economic burden on religious freedom, and where alternative channels and opportunities are left open for religious conduct.

Although the Fifth Circuit decision, *Islamic Center of Mississippi v. Starkville,* 840 F.2d 293 (5th Cir. 1988), did not uphold a zoning ordinance which precluded churches within a residential district, the decision does not conflict with the other circuit decisions. The Fifth Circuit did not uphold the zoning ordinance as applied because the City had totally precluded the moslem students from establishing a mosque within the City limits. This was not an "incidental economic burden" since the regulation left no practical alternatives.

The *Starkville* case does not conflict with the holding in this case or any of the other federal circuit court decisions. The Sixth, Tenth and Eleventh Circuits apply the precedent clearly established by this Court and review is not warranted on the grounds that there is a conflict among the jurisdictions.

CONCLUSION

The Respondent respectfully submits that the Writ of Certiorari prayed for in this action should be denied for the following reasons: (1) There are no special or important reasons for this review; (2) The decision below rests on long established law found in the decisions of this Court; and (3) The decision below turns on facts so unique that any decision of this Court would have no precedential value.

Respectfully submitted,

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APPENDIX

24-67-101. Short title. This article shall be known and may be cited as the "Planned Unit Development Act of 1972". . . .

24-67-103. Definitions. As used in this article, unless the context otherwise requires: . . .

(3) "Planned unit development" means an area of land, controlled by one or more landowners, to be developed under unified control or unified plan of development for a number of dwelling units, commercial, educational, recreational, or industrial uses, or any combination of the foregoing, the plan for which does not correspond in lot size, bulk, or type of use, density, lot coverage, open space, or other restriction to the existing land use regulations.

24-67-105. Standards and conditions for planned unit development. (1) Every resolution or ordinance adopted pursuant to the provisions of this article shall set forth the standards and conditions by which a proposed planned unit development shall be evaluated, which shall be consistent with the provisions of this section. No planned unit development may be approved by a county or municipality without the written consent of the landowner whose properties are included within the planned unit development.

Jefferson County, Colorado, March 6, 1972

ZONING RESOLUTION AMENDMENT - Agricultural Two (A-2) Zone District

Commissioner Lewis moved that the following Resolution be adopted:

WHEREAS, the Board of County Commissioners has previously adopted and subsequently amended the Zoning Resolution for Jefferson County, Colorado, pursuant to Colorado Revised Statutes, 1963, Chapter 106, Article II thereof; and

WHEREAS, urban development is occurring in Jefferson County which has created problems requiring solution by amendment to the Zoning Resolution; and

WHEREAS, the Board of County Commissioners has recently adopted an updated Comprehensive Plan for various portions of Jefferson County, which Plan requires implementation by amendment to the Zoning Resolution; and

WHEREAS, the County Planning Department has proposed certain amendments to the Zoning Resolution, which amendments have been recommended for approval by the County Planning Commission; and

WHEREAS, such amendments have been published for the purpose of giving notice of the hearing before this Board, that various hearings have been held by this Board, and this Board has given extensive consideration to evidence and testimony presented at such hearings and is of the opinion and here finds that such proposed amendments should be adopted in the interest of the health, safety and welfare of the citizens of Jefferson County; and

WHEREAS, after adoption hereof, further implementation of the following amendments will be required for the purpose of providing proper residential zoning in areas that are, in fact, residential subdivisions, not agricultural oriented areas.

NOW, THEREFORE, BE IT RESOLVED by the Board of County Commissioners of Jefferson County that the following amendment be and same hereby is approved as amendments to the Jefferson County Zoning Resolution:

SECTION 10, AGRICULTURAL TWO DISTRICT, is hereby DELETED in its entirety.

ADD, SECTION 10, AGRICULTURAL TWO DISTRICT as follows:

SECTION 10: AGRICULTURAL TWO DISTRICT

A. *Intent of Classification*:

The Agricultural Two Zone District is designed to allow areas for general farming, ranching, intensive agricultural uses and agriculturally related uses while protecting the surrounding land from any harmful effects.

B. *USE Regulation*:

No building or land shall be used and no building shall be hereafter erected, converted or structurally altered unless otherwise provided herein, except for one or more of the following uses:

1. One family dwelling, private garage, barns, sheds, stables, silos, bunkhouses, corrals, pens and runs.

2. General farming including grains, fruit, vegetables, grasses, hay, stock raising, and keeping of horses.

3. Poultry hatcheries and farms, fish hatcheries and dairy farms.

4. Greenhouses and nurseries, including both wholesale and retail, provided products sold are raised on the premises.

5. Forestry farming including raising of trees for any purpose.

6. Road side stands for operation during not more than six (6) months in each year for the sale of farm products raised or produced on the premises, provided such stands are located not less than thirty (30) feet distance from any street, highway, or right-of-way line.

7. Feed lots.

8. Feeding of garbage to hogs.

9. Fur farms and raising of rabbits.

10. Dog kennels and catteries.

11. Veterinarian Hospital.

12. Special Uses: The following uses shall be permitted only upon approval of the Planning Commission and the Board of County Commissioners.

a. Railroad right-of-way.

b. Water supply reservoir, wells, water tower or filter beds, irrigation canal.

c. Sewage treatment plants.

C. *Height Regulation*:

No dwelling or building shall exceed a height of thirty-five (35) feet.

D. *Area Regulations*:

1. *Area and Minimum Width of Lot*:

For every use listed herein there shall be provided a minimum lot area of ten (10) acres. The minimum width of lot shall be three hundred (300) feet.

2. *Front Yard*:

The minimum depth of front yard for dwellings and private garages shall be fifty (50) feet. Accessory buildings housing livestock shall be setback at least seventy-five (75) feet from the front lot line. Feed lots, fur farms, poultry farms, garbage fed hog operations, kennels and catteries will be setback at least one hundred (100) feet from the front lot line, (this requirement includes all pens, runs, or structures which are used or occupied in conjunction with these activities). All other accessory buildings not listed herein shall be set back at least fifty (50) feet from the front lot line.

3. *Side Yard*:

The minimum width of side yard for dwellings and private garages shall be thirty (30) feet. Accessory buildings housing livestock shall be setback at least seventy five (75)

feet from the side lot line. Feed lots, fur farms, poultry farms, garbage fed hog operations, kennels and catteries will be setback at least one hundred (100) feet from the side lot line, (this requirement includes all pens, runs, or structures which are used or occupied in conjunction with these activities). All other accessory buildings not listed herein shall be setback at least fifty (50) feet from the side lot line.

4. *Rear Yard:*

The minimum depth of rear yard shall be fifty (50) feet for all buildings and structures.

E. *General Requirements:*

1. In any property abutting a Residential Zone District, no one causing an objectionable odor, noise or dust shall be permitted within five hundred (500) feet of the boundary of the Residential District.

2. The storage of manure shall not be permitted within one hundred (100) feet of the front lot line and fifty (50) feet of the side lot lines.

3. The approval of the Jefferson County Health Department shall be obtained for all sanitation systems, runs, pens, corrals, or the location of any structure or area which houses livestock, poultry, grains, feed, or manure.

4. Whenever dangerous or exotic animals are kept on the premises, adequate safeguards shall

be provided. In the case of stallions, such animals shall be kept in a pen, corral, or run area enclosed by an eight (8) foot chain link fence, or material equal or greater in strength.

BE IT FURTHER RESOLVED by the Board of County Commissioners that the County Planning Department is hereby instructed to initiate rezoning to appropriate residential zones of all legally recorded subdivisions in Jefferson County which are presently zoned Agricultural Two (A-2) for the purpose of providing proper zoning of a residential classification for subdivisions which are, in fact, residential and not agricultural oriented areas.

BE IT FURTHER RESOLVED by the Board of County Commissioners that until such rezoning to appropriate residential zone categories is accomplished and completed, the County Planning and Building Departments are instructed to continue to approve the issuance of building permits on all lots, parcels or tracts not contained within subdivisions as such lots, parcels or tracts may have existed prior to the adoption of this amendment, it being the purpose of this Board hereof to:

1. Approve the issuance of building permits to any parcels of ground as such may have existed prior hereto to the owner of any such lot or parcel or his grantee or heirs, and

2. That any lot existing prior to this Resolution, zoned agricultural, shall not be further reduced or diminished in size less than ten (10) acres in size subsequent to the adoption of this Resolution without any such reduced lot size being rezoned to a residential zone category.

Commissioner Trezise seconded the adoption of the foregoing Resolution. The roll having been called, the vote was as follows:

Commissioner Joe B. Lewis	"Aye";
Commissioner Jack L. Trezise	"Aye";
Commissioner Bill Huntsbarger	"Aye".

The Resolution was adopted by unanimous vote of the Board of County Commissioners of the County of Jefferson, Colorado.